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Poděkování

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Introduction

The investor-State arbitration has seen a rapid expansion with more than half of the publicly known cases initiated in the last decade and reaching more than a thousand total cases as of 2019.[1] The recent proliferation and the spotlight which came with it have also highlighted a lot of issues, both legal and political.[2] However, only a few have been as discussed as the compatibility of the arbitration clauses in BITs concluded by and between two EU Member States, the so-called intra-EU BITs, with the EU law. They raise questions such as the inherent discrimination of investors within the internal market, the Lisbon Treaty inclusion of foreign direct investment under the exclusive competences of the EU, and the encroachment of the arbitration tribunals on the exclusive jurisdiction of the Court.

The Court seemingly provided a solution to this issue when it in 2018 rendered the *Achmea*[3] judgment where it ruled that the arbitration clause in the Netherlands-Slovakia BIT[4] was incompatible with the EU law.[5] Nevertheless, it used very general language and terms on one hand[6] and relied heavily on the particular wording of the arbitration clause in the Netherlands-Slovakia BIT on the other.[7] Thus, it created uncertainty as to the transferability of its conclusions to other intra-EU BITs.

Therefore, I decided to tackle the issue of the general compatibility of arbitration clauses in the intra-EU BITs with the EU law through the prism of the *Achmea* judgment and whether it actually brought an end to the intra-EU BIT saga or not. That is whether the judgment is legally sound and sufficiently persuasive to be widely accepted by both the arbitral and judicial practice. Accordingly, the main focus of the thesis is on the legal analysis of the issues presented and argued by the Court in the judgment. Both seeing if the Court dealt with them accordingly in line with its previous case-law and if they might require clarification in future rulings. The existing

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[1] United Nations Conference on Trade and Development, 'Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019' (2020), figure 1 <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> accessed 13 April 2021.

[2] See Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) ch 8, 445-446; Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26 Review of International Political Economy 749.

[3] Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

[4] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic (adopted 29 April 1991, entered into force 1 October 1992) 2242 UNTS 205 (Netherlands-Slovakia BIT).

[5] ibid para 62.

[6] Notably it ruled that the provisions 'such as' the arbitration clause in the Netherlands-Slovakia BIT are incompatible with the EU law. See ibid.

[7] See in particular *Achmea* (n 3) paras 40-41.

practice also needs to be analysed to ascertain how the tribunals and courts have received *Achmea* and whether there is development pointing to the further rejection or final acceptance of the invalidity of the arbitration clauses in intra-EU BITs.

In the first part of the thesis, I will identify the main legal grounds the Court relied upon and analyse the relevant case-law and doctrinal opinions to reach independent conclusions and point at the limitations and deficiencies of the Court's reasoning. In the second part, I will then look at the development after the *Achmea* judgment. In particular at how the arbitral tribunals and national courts have treated *Achmea* so far and whether they identified any limitations as well. Finally, I will shortly look at the Termination Agreement[8] concluded by most of the Member States in 2020 which aims to terminate all intra-EU BITs to see whether it could be the ultimate solution.

[8] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1 (Termination Agreement).

I. The intra-EU BITs and *Achmea*

Bilateral investment treaties, in short BITs, are international treaties concluded by two different States which intent to support the investments by investors from each other in their respective territories. Due to their bilateral nature they may include a vast array of different provisions depending on the needs and priorities of the States in question. However, they maintain a certain degree of uniformity throughout the international community. They include obligation of the States to admit investments from the other one and to provide a certain level of protection to the investors, eg fair and equitable treatment, national treatment, or most-favourite-nation treatment. More importantly for this thesis, they also include a dispute resolution clause.[9]

The BITs started to emerge in Europe during the second half of the 20th century with the first BIT being concluded between Germany and Pakistan in 1959. However, it was not until the fall of the communist regimes in Central and Eastern Europe that they began to truly proliferate between countries in the European region.[10] The 1990s also marked the beginning of the widespread use of the dispute resolution clauses in the BITs. These allowed the investors to directly bring action against the State in which they invested for breaches of the BIT in front a neutral international arbitration panel.[11] The investor-State arbitration, or just investment arbitration, was thus born.

With regards to the EU, the BITs were originally concluded between Member States and third countries. However, when the EU expanded to the south in the 1980s and then to the east in the 2000s some of these third countries became EU Member States. Thus, more than 190 BITs were now entered into by two Member States, ie they were intra-EU BITs.[12] The Commission then very early on established that it considered those BITs to be non-compliant with the EU law. Already in 2006 the Commission raised its objections during the *Eastern Sugar v Czech Republic*[13] arbitration proceedings[14] which were initiated in 2004 right after the Czech Republic acceded to the EU.[15]

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[9] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017), paras 2.04-2.38.
[10] John P Gaffney and Zeynep Akçay, 'European Bilateral Approaches' in Marc Bungenberg and others (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 186-201, paras 4-10.
[11] ibid paras 15-17.
[12] Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements Between EU Member States under EU and International Law' (2011) 48 CML Rev 63, 63.
[13] *Eastern Sugar BV v The Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007).

The Commission continued with its efforts and participated as *amicus curiae* in almost all intra-EU BIT cases. Generally, it objected that the EU law takes precedence over the BITs both because of the primacy of the EU law and because the accession treaties are subsequent treaties with same subject matter pursuant to Article 30 VCLT.[16] More particularly, the Commission claimed that the intra-EU BITs resulted in discrimination between investors from different Member States. Finally, the arbitration mechanism infringed on the exclusive jurisdiction of the Court under the Article 344 TFEU[17] and breached the Article 267 TFEU because the arbitration tribunal could not make a preliminary ruling request regarding EU law.[18] The arbitration agreement in the BIT was thus according to the Commission incompatible with the EU law and inapplicable.

The Commission also continued with its efforts to negotiate that the Member States terminate the intra-EU BITs.[19] Then, in 2015 the Commission formally asked all Member States to terminate their intra-EU BITs and initiated infringement proceedings against five of them.[20] In its announcement it also explained some of the ideological and political issues of the intra-EU BITs. According to the Commission, the BITs were originally aimed to promote investment in the countries that would later become Member States. However, now these agreements divided the internal market because they provided their protections on bilateral basis whereas the EU law provided the same protection to all EU investors. They were therefore inherently discriminatory and caused uncertainty for foreign investors, thus discouraging cross-border investments.[21]

Finally, on 6 March 2018 the Court ruled in the case of *Achmea.*[22] The preliminary ruling was requested already in 2016 by the German Federal Court of Justice (*Bundesgerichtshof*) which was deciding on the setting aside of the award rendered in 2012 against Slovakia. The underlying dispute concerned a Dutch health insurance company Achmea BV (formerly Eureko

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[14] David Restrepo Amariles, Amir Ardelan Farhadi and Arnaud Van Waeyenberge, 'Reconciling International Investment Law and European Union Law in the Wake of Achmea' (2020) 69 ICLQ 907, 913.
[15] Nikos Lavranos, 'The World after the Termination of Intra-EU BIT S' (2020) 5 European Investment Law and Arbitration Review Online 196, 197 <https://doi.org/10.1163/24689017_008> accessed 27 March 2021.
[16] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). Notably, the Commission did not assert that the BITs were terminated by virtue of the Article 59 VCLT through the accession of the second Contracting Party to the EU.
[17] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU). See eg *Achmea BV (formerly Eureko BV) v The Slovak Republic*, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), paras 176-193.
[18] Lavranos (n 15) 198.
[19] ibid.
[20] Those were Austria, the Netherlands, Romania, Slovakia, and Sweden.
[21] European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' (18 June 2015) <https://ec.europa.eu/commission/presscorner/detail/en/ip_15_5198> accessed on 16 April 2021.
[22] *Achmea* (n 3).

BV) which set up its subsidiary in Slovakia to offer its services. However, the Slovak government regulated the industry in 2007 and prohibited the distribution of profits abroad. Thus, the Dutch company used the arbitration clause in the Article 8 of the Netherlands-Slovakia BIT to initiate arbitration proceedings against Slovakia for the breach of the BIT. In the end, Achmea BV was awarded EUR 22.1 million by the arbitral tribunal.[23]

Considering that Slovakia acceded to the EU in 2004 this was a typical case of an arbitration based on an intra-EU BIT. Slovakia therefore adopted the Commission's position and already during the arbitration proceedings claimed that the tribunal lacked jurisdiction since, among others, the Netherlands-Slovakia BIT was superseded by the EU law. As such, the tribunal would have to apply EU law which it was precluded from by the exclusive jurisdiction of the Court. It therefore lacked jurisdiction to decide the dispute.[24]

After the final award, Slovakia applied to the Higher Regional Court (*Oberlandesgericht*) in Frankfurt am Main to set it aside.[25] The main reason was that because the arbitral tribunal could be forced to apply EU law and thus infringe on the exclusive jurisdiction of the Court, it was inherently incompatible with EU law and not valid. No arbitration agreement was therefore concluded and the award breached the public policy. The Higher Regional Court rejected this application and Slovakia appealed to the German Federal Court of Justice.[26]

The Federal Court of Justice recognized that the issue of the validity of the arbitration clause concerned EU law and as the final ordinary court of the German judicial system decided it was necessary to make a preliminary ruling reference to the Court. Specifically, it asked the Court whether the prohibition of discrimination based on nationality in the Article 18 TFEU, the preliminary ruling procedure under the Article 267 TFEU, or the exclusive jurisdiction of the Court under the Article 344 precluded the application of the arbitration clause in the BIT.[27]

In the preliminary ruling the Court disregarded the question of discrimination under the Article 18 TFEU and focused only on the two other questions which it combined. In the reasoning it introduced in broad terms the principle of autonomy of the EU law[28] and ultimately

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[23] *Achmea* (n 3) paras 6-12.
[24] *Achmea,* Award on Jurisdiction (n 17) paras 127-142.
[25] The German Civil Procedure Code (*Zivilprozessordnung*) provides for the standard UNCITRAL Model Law grounds for setting aside of awards with only minor deviations. Compare German Civil Procedure Act, § 1059; UNCITRAL Model Law, art 34.
[26] BGH (31 October 2018) I ZB 2/15, paras 11-14.
[27] *Achmea* (n 3) para 23.
[28] *Achmea* (n 3) paras 31-37.

it found that indeed the Articles 267 TFEU and the Article 344 TFEU preclude the application of the arbitration clause in the Netherlands-Slovakia BIT.[29]

However, the argumentation of the Court is perplexing at best at times and it is unclear whether the conclusions are transferrable to other BITs. In the next chapter, I will therefore introduce the elusive principle of the autonomy of the EU law. In further three chapters, I will then follow the Court's reasoning in *Achmea* and analyse the three main aspects of the autonomy the Court raised regarding the investment arbitration. Those are the compatibility of investment arbitration with the exclusive jurisdiction of the Court under the Article 344 TFEU, with the preliminary ruling procedure under the Article 267 TFEU, and with the principle of mutual trust.

[29] *Achmea* (n 3) para 62.

1. Autonomy of the EU legal system

The principle of autonomy of the EU legal system and the EU is not expressly mentioned anywhere in the Treaties but it is still one of the most important principles as it is part of the extra-Treaty primary law.[30] It is solely the creation of the Court's case-law where it appeared at first in the early constitutional rulings of the 1960s.[31] In *Van Gend en Loos,* the Court found the Community constituted 'a new legal order of international law'.[32] Then in *Costa v ENEL,* the Court stated that the Treaties established their 'own legal system' and were an independent source of law.[33] In the French and German version the Court even used the term autonomous source of law (*source autonome*, *Autonomen Rechtsquelle*) rather than independent.[34] The autonomy of the EU law therefore initially served together with the principles such as the primacy and direct effect to distinguish the EU law internally against legal orders of the Member States. However, an external dimension aiming against the international law as well started to appear in the in 1990s.[35]

(i) Emergence from the Article 344 TFEU

In the *Opinion 1/91*,[36] the Court reviewed the compliance of the European Economic Area Agreement with the EU law. The agreement proposed a court that could resolve disputes between the contracting parties. That would also mean between the Community and a Member State or between the Member States themselves.[37] Accordingly, the Court found that the proposed court would have had to rule on the competences of the Community and the Member States. As such, the Court invoked its exclusive jurisdiction regarding the interpretation and application of the Treaties pursuant to Article 19(1) TEU[38] and Article 344 TFEU and decided

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[30] Niamh Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) 88 Nord J Intl L 9, 20.
[31] Panos Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) 88 Nord J Intl L 41, 43.
[32] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, [1963] ECR 1.
[33] Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66, [1964] ECR 585.
[34] Ingolf Pernice, 'The Autonomy of the EU Legal Order – Fifty Years After *Van Gend*' in Court of Justice of the European Union, *50th anniversary of the judgment in Van Gend en Loos, 1963-2013* (Publications Office of the European Union 2013), 56.
[35] Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (n 31) 44-45.
[36] Opinion 1/91 ECLI:EU:C:1991:490, [1991] ECR I-6079.
[37] ibid para 33.
[38] Consolidated version of the Treaty on European Union [2016] OJ C202/13 (TEU).

that the proposed court was 'likely adversely to affect the allocation of responsibilities defined in the Treaties'[39] and thus the autonomy of the EU law.[40]

The Court therefore considered the autonomy to be in danger because its own exclusive jurisdiction under the Article 344 TFEU would have been encroached upon by an international body. The Court reviewed an amended version of the European Economic Area Agreement again in the *Opinion 1/92*.[41] The Court found that the autonomy of EU law was protected because the decisions of the proposed dispute resolution body would not affect the case-law of the Court[42] and the Court could be requested to provide binding interpretation of relevant Community laws.[43] As such, the essential and indispensable safeguards for the autonomy of the EU law were provided.[44]

The Court interpreted both of these Opinions and the conditions under which the autonomy would not be adversely affected in its *Opinion 1/00*[45] regarding the European Common Aviation Area Agreement. Firstly, the 'essential character of the powers of the Community and its institutions' provided for by the Treaties must not be changed.[46] Secondly, decisions of the international dispute resolution bodies must not bindingly affect the Community and its institutions while exercising their internal powers such as the interpretation of the EU law.[47] Moreover, as laid down in *MOX Plant*[48] the autonomy need not be actually adversely affected but a 'manifest risk' of it happening is sufficient.[49]

(ii) The Addition of the Preliminary Ruling Procedure and Mutual Trust

The Court therefore firstly relied on the Article 344 TFEU and Article 19(1) TEU and its exclusive jurisdiction to establish the principle of autonomy of EU law. Still, it was already concerned with its power to guarantee the unified interpretation of the EU law[50] and referred generally to preliminary rulings.[51] However, it was in the *Opinion 1/09*[52] regarding the unified

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[39] Opinion 1/91 (n 36) para 35.
[40] ibid paras 33-35.
[41] Opinion 1/92 ECLI:EU:C:1992:189, [1992] ECR I-2821.
[42] ibid para 23.
[43] ibid para 34-35.
[44] ibid para 24.
[45] Opinion 1/00 ECLI:EU:C:2002:231, [2002] ECR I-3493.
[46] ibid para 12.
[47] ibid para 13.
[48] Case C-459/03 *Commission v Ireland* (*MOX Plant Case*) ECLI:EU:C:2006:345, [2006] ECR I-4635.
[49] ibid para 154.
[50] Shuibhne (n 30) 17.
[51] *Van Gend en Loos* (n 32).

patent litigation system where it used the Article 19(1) TEU[53] to accentuate the role of the national courts and the preliminary ruling procedure in the protection of the autonomy. The Court firstly poetically called the national courts and itself the 'guardians of [the] legal order and the judicial system of the European Union'.[54] Then it followed that an international agreement cannot deprive national courts of their power to implement EU law and within that sense the power and obligation to request a preliminary ruling pursuant to the Article 267 TFEU.[55] The Court thus extended the protection which the autonomy of the EU law provided to its own jurisdiction to the jurisdiction of the national courts as well.

In the *Opinion 2/13*[56] regarding the accession of the EU to the European Convention of Human Rights the Court again looked at the autonomy of the EU law more broadly. It reflected that the EU law created an interdependent and structured network of principles and relations linking the EU and the Member States.[57] It reiterated that these specific characteristics and the autonomy of the EU law are guaranteed by the EU judicial system which ensures the interpretative consistency and uniformity of EU law.[58] It followed that the preliminary procedure was the 'keystone'[59] of this judicial system and the risk of its circumvention would adversely affect the autonomy of the EU law.[60] Finally, the Court added another aspect to the autonomy when it found that the 'underlying balance of the EU' and the autonomy of its legal system may be threatened by a breach of the mutual trust between Member States.[61]

(iii) The Resulting Principle

The autonomy of the EU legal system and the EU law is thus a very ambiguous principle that as Koutrakos rightly pointed out 'may mean different things in different contexts'.[62] It is a basic

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[52] Opinion 1/09 ECLI:EU:C:2011:123, [2011] ECR I-1137.
[53] The Article 19(1) TEU was amended by the Treaty of Lisbon which introduced the express obligation of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by the EU law. Regarding the extent to which this was only a reiteration of the Court's preceding case-law or a new obligation see eg Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2nd edn, CUP 2010), 312.
[54] Opinion 1/09 (n 52) para 66.
[55] ibid para 80.
[56] Opinion 2/13 ECLI:EU:C:2014:2454.
[57] ibid para 167.
[58] ibid para 174.
[59] ibid para 176.
[60] ibid paras 198-199.
[61] ibid para 194.
[62] Panos Koutrakos, 'The anatomy of autonomy: themes and perspectives on an elusive principle' in *Building bridges: central banking law in an interconnected world: ECB Legal Conference 2019* (European Central Bank 2019), 103.

principle of the EU law on its own but it also stems from and includes other independent principles[63] like the mutual trust. It is also one of the basic structural principles of the EU together with, among others, sincere cooperation, institutional balance, and subsidiarity.[64] It is certainly closely connected to the primacy and direct effect of the EU law since it was established together with them in the early case-law of the Court. In some views it may even include substantive aspects like the notions of the rule of law,[65] fundamental rights,[66] and democracy.[67]

Still, there are some recurring themes throughout the case-law. Firstly, the Court uses the autonomy of EU law to mainly protect its own exclusive jurisdiction and authority regarding EU legal order and the monopoly on the interpretation of EU law found primarily in the Article 344 TFEU.[68] It tries to justify this by the fact that it needs to ensure the uniform application of EU law across the Member States.[69] However, the Court interprets autonomy principally without much regard to the underlying substantive issues and the consequences[70] as if 'nothing was more important'.[71] This can be explained by the fact that 'the very existence of the Union is deemed to be vulnerable' when the Court invokes the autonomy.[72] This attitude has been thus criticized because it protects the Court's jurisdiction without regard to the effect on other EU actors and their ability to actually interact internationally.[73]

Secondly, the autonomy is not just about the Court itself anymore. With the *Opinion 1/09*, the Court started using the Article 19(1) TEU to emphasize the role of the domestic courts as well. Thus, it found that the preliminary ruling procedure under the Article 267 TFEU is another source and guarantee of the autonomy. Moreover, with the addition of national courts the principle of mutual trust between Member States has to be upheld as well. It can be argued that this is just an extension of the first point because the Court focuses on the capacity of the domestic courts to make a preliminary ruling reference to the Court. Thus, it again strengthens its

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[63] Shuibhne (n 30) 19.
[64] ibid 21.
[65] Pernice (n 34) 61;Steffen Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law - the CJEU's judgment in Achmea put in perspective' (2019) 44 EL Rev 383, 387.
[66] Shuibhne (n 30) 15.
[67] Koutrakos, 'The anatomy of autonomy' (n 70) 98-100.
[68] Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (n 31) 46.
[69] Opinion 2/13 (n 56) para 174.
[70] Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (n 31) 47.
[71] Shuibhne (n 30) 25.
[72] ibid 28.
[73] ibid 29.

own position and jurisdiction regarding EU law.[74] However, it is a distinct feature in the case-law and is one of the key points in *Achmea* and as such should not be simply disregarded.

[74] Koutrakos, 'The anatomy of autonomy' (n 70) 100.

2. Breach of the Article 344 TFEU

The Article 344 TFEU obliges the Member States to refrain from submitting disputes 'concerning the interpretation or application of the Treaties' to any other dispute settlement body than those provided for by the Treaties. Thus, the Court uses it together with the Article 19(1) TEU to establish its exclusive jurisdiction regarding interpretation of EU law. On its basis, the Court rules that no international agreement may affect the allocation of powers fixed by the Treaties.[75] As such, it is mainly used to protect the Court and other EU institutions[76] from the change of their competences without sufficient safeguards to the autonomy of EU law.

In *Achmea*, the Court relied on the Article 344 TFEU as one of the main provisions of the Treaties involving autonomy.[77] However, it did not engage in any thorough interpretation of this Article and its application to intra-EU BITs[78] even though it was the subject of the one of the preliminary questions[79] and the Court found it was breached.[80] The Advocate General Wathelet on the other hand identified two issues regarding its applicability to investment arbitration.[81] Firstly, the Article 344 TFEU may be applicable only to disputes between Member States or Member States and the EU and not to disputes between individuals and Member States.[82] Secondly, it requires that the dispute concerns the interpretation or application of the Treaties.[83] I will therefore focus on these aspects of the Article 344 TFEU.

2.1. Disputes between Individuals and Member States

The first criterion of the applicability of the Article 344 TFEU to investment arbitration is whether the Article actually concerns disputes between individuals and Member States. In *MOX Plant* the Court ruled regarding a dispute between two Member States which submitted their dispute to an arbitral tribunal. There it found that the Treaties provided for an inherent dispute

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[75] Opinion 2/13 (n 56) para 201.
[76] In the Opinion 1/00 (n 45), the Court was also reviewing the effect of the proposed European Common Aviation Area on the powers of the Commission.
[77] Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law' (n 65) 385.
[78] Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (n 31) 55.
[79] *Achmea* (n 3) para 23.
[80] *Achmea* (n 3) para 60.
[81] The Advocate General Wathelet reviewed also a third issue when addressing the preliminary question regarding Article 344 TFEU. This was whether the investment arbitration would undermine the allocation of powers fixed by the Treaties. However, as he pointed out in paragraph 229 of his Opinion, it was only an alternative argument in case the Article 344 TFEU had not been used. Thus, it did not concern the actual applicability of the Article 344 TFEU to investment arbitration.
[82] Case C-284/16 *Achmea*, Opinion of AG Wathelet ECLI:EU:C:2017:699, paras 138-159.
[83] ibid paras 160-228.

resolution mechanism between Member States in the Article 259 TFEU. Thus, the Member States breached their obligation under the Article 344 TFEU when they opted for arbitration.[84] In a similar fashion, the Court ruled in the *Opinion 2/13* that the possibility of disputes between Member States or some Member States and the EU being brought in front of the European Court of Human Rights would violate the Article 344 TFEU.[85] As such, the Article undoubtedly applies to disputes between Member States and even between Member States and the EU but its applicability to disputes between Member States and individuals is uncertain.[86]

The Article does not explicitly bind individuals. It speaks of and obliges only the Member States and therefore may not apply to actions brought by individual investors.[87] Moreover, there are no provisions in the Treaties that would establish a dispute resolution mechanism between individuals and Member States like the Article 259 TFEU does for disputes between the Member States. This fact strongly distinguishes the investment arbitration from the inter-state arbitration and the conclusion in *MOX Plant*.[88] It was on this basis that the arbitral tribunal in *Achmea* protected its jurisdiction.[89]

Furthermore, the Court interpreted the Article 344 TFEU in the *Opinion 1/09* and stated that it 'merely' applied to Member States and their disputes. To this the Court contrasted that the proposed patents court would resolve only disputes between individuals regarding patents. Thus, it found that the establishment of the patents court would not breach the Article 344 TFEU.[90]

Even more interestingly, in the *Opinion 2/13* the Court went to great lengths to interpret why the accession of the EU would breach the Article 344 TFEU. However, it stayed silent regarding the applications brought by individuals against states under the Article 34 ECHR[91] and it focused purely on the disputes between High Contracting Parties under the Article 33 ECHR.[92] This is a significant omission as the inter-state applications have made up only a few dozen cases throughout the history of the ECHR[93] compared to the tens of thousands of individual

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[84] *MOX Plant* (n 48) paras 128-139.
[85] Opinion 2/13 (n 56) paras 202-208.
[86] Maria Fanou, 'Intra-European Union investor–State arbitration post-Achmea: RIP?' (2019) 26 Maastricht Journal of European and Comparative Law 316, 323
[87] Dimopoulos (n 12) 87; Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (n 31) 55.
[88] Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 CML Rev 383, 404.
[89] *Achmea,* Award on Jurisdiction (n 17) para 276.
[90] Opinion 1/09 (n 52) para 63.
[91] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[92] Opinion 2/13 (n 56) paras 201-214. Similarly in *Achmea*, Opinion of AG (n 82) para 152; Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (n 31) 56.
[93] European Court of Human Rights, 'Inter-State applications: By date of introduction of the applications' (23 February 2021) <www.echr.coe.int/Documents/InterState_applications_ENG.pdf> accessed on 16 March 2021.

applications each year.[94] The individual applications under ECHR and the investment arbitration are also strikingly similar insofar as they both include an individual lodging an action against a State because of its wrongdoing. The negative position towards the interpretation of the Article 344 TFEU which would include investment arbitration was in the end adopted also by the Advocate General Wathelet in his Opinion in *Achmea*.[95]

On the other hand, the Article 344 TFEU can be compared to the Article 273 TFEU which is explicitly restricted just to disputes 'between Member States'. There is no such limitation in the Article 344 TFEU which rather includes a general obligation of Member States not to submit a dispute concerning the interpretation of EU law to any settlement not provided in the Treaties. That is also supported by the fact that the Article 344 TFEU is systematically included in the final provisions among other more broad and general obligations. According to the Commission, it is the Member States which conclude the BIT and thus allow for a dispute to be settled differently. Thus, they breach their obligation of the Article irrespective of any arbitration proceedings which may arise.[96] Additionally, Hindelang relies on the German language version which uses the phrase 'to regulate disputes'[97] to expand the meaning of the English 'to submit a dispute'. Accordingly, the Article should point to the general legislative or administrative capacity of the Member States to make rules. Any regulation of disputes, including BITs, would therefore fall under the Article 344 TFEU.[98]

This interpretation has in my view two major issues. Firstly, the German language version is not as straightforward as Hindelang suggests. The phrase used can mean 'to resolve disputes' as well which is more in line with the English language version. Similarly, the other language versions of the TFEU also support the English language reading of the Article rather than the broad version which would concern regulation.[99] More importantly, the suggestion that the Article concerns all disputes that the Member States can regulate irrespective of the involved parties would broaden the meaning of the Article even beyond investor-state arbitration to disputes purely between individuals. As such, the reasoning would necessarily lead to a

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[94] European Court of Human Rights, 'Analysis of statistics 2020' (January 2021) <https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf> accessed 16 March 2021.
[95] *Achmea*, Opinion of AG (n 82) paras 153.
[96] European Commission, 'Schriftliche Erklärungen zum Vorabentscheidungsersuchen gemäß Artikel 23 Absatz 2 des Protokolls über die Satzung des Gerichtshofs' (30 August 2016) para 93-95 <https://ec.europa.eu/dgs/legal_service/submissions/c2016_284_obs_de.pdf> accessed on 17 March 2021.
[97] '*Streitigkeiten […] zu regeln*'.
[98] Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law' (n 65) 386.
[99] For example, in French the Article 344 TFEU reads "*ne pas soumettre un différend*", in Spanish "*no someter las controversias*", and in Czech "*spory […] nebudou řešit jinak*".

conclusion that runs contrary to the *Opinion 1/09* where the Court spelled out that the Article does not cover cases between individuals.

Nevertheless, the arguments should not be just disregarded completely. After all, the Court already expanded the scope of the Article beyond just disputes between the Member States. In the aforementioned *Opinion 2/13* it ruled that also submissions by the EU against the Member States or vice versa would undermine the Article 344 TFEU.[100] A possible meeting ground between the two interpretative positions may then actually be the cases involving Member States on one side but not on the other.

In conclusion, the Article 344 TFEU regulates 'merely' disputes of Member States, not solely those between individuals, and the Court passed on chances to rule that it covers disputes between individuals and Member States. However, the silence should not be taken as conclusive since there are strong arguments supporting an interpretation which would expand the application of the Article beyond just disputes between Member States. As, the Court failed to properly clarify this issue in *Achmea* it should do so in its future case-law.

2.2. Disputes regarding the interpretation of the Treaties

The second condition of the Article 344 TFEU is that the dispute is 'concerning the interpretation or application of the Treaties'. Therefore, either the investment treaty in question becomes part of EU law or the arbitral tribunal has to interpret or apply other EU law when deciding. In its previous case-law the Court found that the first is true for mixed agreements, ie treaties concluded by both the Member States and the EU. Upon the accession of the EU they form part of the EU legal order pursuant to Article 216(2) TFEU and the Court acquires its exclusive interpretative jurisdiction. For example in case of the ECHR, the Court thus pointed out that it would be solely eligible to decide disputes between the Member States or EU and the Member States regarding breaches of the ECHR itself.[101] However, this is not the case for BITs concluded by Member States since the EU is not a party to them and the Article 216(2) TFEU would not apply.

As such, the second point has to be examined. That is whether the arbitral tribunal could be interpreting or applying any other provision of EU law and hence it could encroach upon the Court's exclusive jurisdiction. Firstly, the tribunal does not need to interpret EU law in the actual

[100] Opinion 2/13 (n 56) para 210.
[101] *MOX Plant* (n 48) paras 126-127*;* Opinion 2/13 (n 56) paras 180, 204.

dispute. The Court set the threshold in *Achmea* on a mere 'liability' to interpretation.[102] Secondly, the EU law is thanks to its supremacy and direct effect part of the domestic law of Member States and it is international law deriving from an international agreement.[103] That was a major differentiation from the Advocate General Wathelet who analysed the substantive similarities between the Netherlands-Slovakia BIT and EU law to find out whether the EU law would actually have to be interpreted and would impact the dispute.[104] The Court's approach is understandable. The tribunals in investment arbitration in theory decide only whether the BIT, a treaty under international law, was breached. Nevertheless, majority of the provisions of BITs cover the same areas as the EU law [105]and in practice the tribunals are called to consider arguments based on the EU law.[106] They deal with it either as a matter of law, be it international law or domestic, or as a matter of fact.[107] Even in *Achmea* the tribunal discussed in its Award on Jurisdiction the compatibility of the provision on fair and equitable treatment with the prohibition of discrimination or any other principle of EU law.[108] As such, the arbitral tribunals pretty much always interpret or apply EU law at least to some extent.

However, the Court provided some caveats to the particular interpretation under the Article 344 TFEU. Already in the *Opinion 1/00* the Court noted that the main issue would be if the decisions of a dispute resolution body would bind the EU with its interpretation of the EU law.[109] The Court further expanded on this in the *Opinion 1/17*[110] regarding the proposed Comprehensive Economic and Trade Agreement between Canada and the EU and Member States. There the Court found that the proposed tribunal would not have jurisdiction to interpret EU law because it would treat EU law only as a matter of fact, it would follow the established interpretation of the Court, and whatever its conclusions would be they would not be binding on the Court or other EU institutions.[111]

It can be also argued that the interpretation of the arbitral tribunal in investment arbitration is never binding in 'as a matter of EU law' on the EU as the BIT is not part of the EU law. This

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[102] *Achmea* (n 3) para 3.
[103] *Achmea* (n 3) paras 33, 40.
[104] Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) 14 EuConst 767, 777-78.
[105] Dimopoulos (n 12) 89.
[106]Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 LIEI 179, 196; Amariles, Farhadi and Waeyenberge (n 14) 921.
[107] Fanou (n 86) 325.
[108] *Achmea,* Award on Jurisdiction (n 17) para 250.
[109] Opinion 1/00 (n 45) para 13. See also Opinion 2/13 (n 56) para 184.
[110] Opinion 1/17 ECLI:EU:C:2019:341.
[111] ibid paras 130-131.

idea draws from the analogy that the decisions of international courts regarding national law are not binding on national courts as a matter of national law.[112] Similarly, the Court also takes into account law but does not have the jurisdiction to authoritatively interpret national law. It only 'tak[es] cognizance of' it.[113] However, this argumentation without any additional safeguards as provided in the CETA may be problematic since it would potentially subject Member States to conflicting obligations arising from the interpretation of the Court and those of the tribunal.[114]

In *Achmea,* the Court relied on a very wide jurisdictional clause[115] that empowered the tribunal to decide on the basis of the domestic law and other international agreements between the parties to the BIT. It even listed the domestic law first before the provisions of the BIT itself.[116] Therefore, the ruling should not by itself be automatically applicable on other BITs when it comes to this issue. Moreover, CETA showed a way how to comply with Article 344 TFEU as it provided for several safeguards and was drafted not to infer on EU law as much as possible.[117] The current arbitral clauses thus have to be analysed on a case by case basis to decide whether the arbitral tribunal actually infringes the Court's exclusive jurisdiction.

In conclusion, the EU law is generally part of the domestic law of the Member States and the arbitral tribunal needs to only be liable to possibly interpret or apply domestic law and in turn the EU law. However, the interpretation also needs to be binding on the EU to fall within the meaning of the Article 344 TFEU. Whereas the CETA introduced safeguards against the binding nature of the interpretation made by its proposed tribunal such as that it considers the EU law only as a matter of fact which sufficiently guarantee compliance with the Article. The *Achmea* judgment should not be therefore considered automatically applicable on all investment treaties concluded by the Member States as it heavily depended on the particular wording of the BIT in question.

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[112] Pohl (n 104) 778.
[113] Fanou (n 86) 325.
[114] Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law' (n 65) 389.
[115] Koutrakos, 'The anatomy of autonomy' (n 70) 93.
[116] Netherlands-Slovakia BIT, art 8(6).
[117] Koutrakos, 'The anatomy of autonomy' (n 70) 97.

3. Breach of the Article 267 TFEU

The Article 267 TFEU provides crucial support to the autonomy of the EU law as it establishes the dialogic relationship between the national courts and tribunals and the Court.[118] Pursuant to the Article, it is only the Court which has the jurisdiction to give ruling concerning the interpretation of the EU law. Therefore, in cases where such interpretation is necessary 'any court or tribunal of a Member State' can request the Court to give a preliminary ruling.

The sole power to interpret EU law therefore puts the Court on the top of the judicial order regarding EU law.[119] However, the relationship is not hierarchical where the Court would be superior to national courts but rather cooperative where the responsibilities are divided. The Court decides on the questions of EU law and national courts consider the need for a preliminary ruling and then potentially apply it to the actual case.[120] As such the national courts are still very much involved in the correct application and uniform interpretation of the EU law and are therefore 'indispensable to the preservation of the very nature' of it.[121]

In *Achmea,* the Court found that the arbitration clause was in breach of the Article 267 TFEU because investment arbitration could not ensure full effectiveness of EU law during the resolution of a dispute.[122] The Court reached this conclusion after considering two criteria. Firstly, whether the arbitral tribunal in investment arbitration is a court or tribunal of a Member State and therefore can make a reference for a preliminary ruling.[123] Secondly, whether a court of a Member State could request a preliminary ruling regarding the compliance of the arbitral award with EU law during its review of the award.[124] I will therefore examine these findings and the argumentation of the Court in the next two sections.

3.1. Preliminary Ruling Requested Directly by the Arbitral Tribunal

According to the Court's case-law, whether a dispute resolution body is a court or tribunal in terms of Article 267 TFEU is only a matter of the EU law and depends on several factors 'such as whether the body is established by law, whether it is permanent, whether its jurisdiction is

[118] Amariles, Farhadi and Waeyenberge (n 14) 922.
[119] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (4th edn, CUP 2019), 170.
[120] Catherine Barnard and Steve Peers, *European Union Law* (3rd edn, OUP 2020), 316.
[121] Opinion 1/09 (n 52) para 84-85.
[122] *Achmea* (n 3) para 56.
[123] *Achmea* (n 3) para 49.
[124] *Achmea* (n 3) para 50.

compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.[125] The proceedings also need to lead to a decision of judicial nature.[126] Finally, the Court also considers whether the tribunal is part of the judicial system of a Member State.[127] Generally, these criteria provide only a framework and do not have to be strictly met every single time[128] but I will systematically analyse each of them in this section to determine whether they would be fulfilled in case of an investment arbitration tribunal.

3.1.1. Establishment by Law

The establishment by law requires that there is a statutory quality to basis of the jurisdiction of the dispute resolution body.[129] It is distinguished against a situation where the jurisdiction of the tribunals comes from the agreement and will of the parties which include the arbitration clause in their contract.[130] This is the case for example in commercial arbitration.[131]

In case of investment arbitration there is usually no such agreement between the parties themselves. Rather there is a bilateral or a multilateral investment treaty concluded between States. The arbitration is still based on consent of the parties as the investor accepts the offer of arbitration provided by the State.[132] However, the system of the arbitration and the offer are included in a treaty, rather than a private contract. These are also often implemented or ratified on the national level by law giving them the same quality and rank.[133] Therefore, the investment arbitration as a system can be considered as established by law.

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[125] See Case C-54/96 *Dorsch Consult Ingenieursgesellschaft v Bundesbaugesellschaft Berlin* ECLI:EU:C:1997:413, [1997] ECR I-4961, para 23; Case C-394/11 *Belov* ECLI:EU:C:2013:48, para 38; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* ECLI:EU:C:2014:1754, para 23; Case C-203/14 *Consorci Sanitari del Maresme* ECLI:EU:C:2015:664, para 17; *Achmea*, Opinion of AG (n 82) para 86.
[126] *Belov* (n 125) para 39 .
[127] Case C -196/09 *Miles and Others* ECLI:EU:C:2011:388, [2011] ECR I-5105, para 38.
[128] Konstanze von Papp, 'Clash of 'Autonomous Legal Orders': Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? - A Plea for Direct Referral from Investment Tribunals to the ECJ' (2013) 50 CML Rev 1039, 1067.
[129] ibid.
[130] Case 102/81 *Nordsee v Reederei Mond* ECLI:EU:C:1982:107, [1982] ECR 1095, para 11.
[131] *Achmea*, Opinion of AG (n 82) para 91.
[132] Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg and others (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 1212-87, para 43.
[133] Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32 J Intl Arb 368, 378.

3.1.2. Permanence

Arbitral proceedings can be conducted in two main ways; either they can be administered by an arbitral institution or an *ad hoc* tribunal for that particular case can be established.[134] However, the Court does not draw the line regarding permanence in this way. In fact, the Court rarely refuses to hear a request for preliminary ruling purely based on the *ad hoc* nature of the dispute resolution body.[135]

In *Ascendi*,[136] the Court considered the Portuguese *Tribunal Arbitral Tributário* tasked with the resolution of taxation disputes. Although it was established by the Constitution of the Portuguese Republic, the actual tribunals were composed and formed for the individual cases and their activity ended once they made their ruling.[137] Nevertheless, the Court found that the permanence of the *Tribunal Arbitral Tributário* stemmed from it being an established 'element of the system'.[138] Previously, the Court issued a similar ruling in *Merck Canada*[139] where it disregarded the fact that the *Tribunal Arbitral necessário* dissolved after making its decision and its composition and rules of procedure could differ based on the choice of the parties. The Court rather focused on its structural permanence derived from its establishment by law and permanent compulsory jurisdiction.[140]

The aforementioned rulings were used as a support for the doctrinal interpretation that arbitral tribunals established by investment treaties should be also considered as permanent. They are part of a system of judicial protection set out by the respective treaty.[141] This would be true in particular with regards to the arbitral tribunals having an institutional support such as those under the ICSID Convention.[142] The Advocate General Wathelet in his Opinion regarding *Achmea* adopted this view as well because the Member States 'established arbitration as the means of settling disputes between one of them and an investor from the other State'.[143]

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[134] Monique Sasson, 'Investment Arbitration: Procedure' in Marc Bungenberg and others (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 1288-372, para 27.
[135] Von Papp (n 128) 1072.
[136] *Ascendi* (n 125).
[137] Case C 377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, Opinion of AG Szpunar ECLI:EU:C:2014:246 paras 36-37; *Ascendi* (n 125) para 26.
[138] *Ascendi* (n 125) para 26.
[139] Case C-555/13 *Merck Canada* ECLI:EU:C:2014:92.
[140] ibid para 24.
[141] Basedow (n 133) 379.
[142] Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention). Von Papp (n 128) 1072.
[143] *Achmea*, Opinion of AG (n 82) para 105.

3.1.3. Compulsory Jurisdiction

The use of this condition has been fairly inconsistent throughout the Court's case-law but two basic aspects of compulsory jurisdiction have arisen.[144] Firstly, it has been interpreted as meaning that the decision has to be binding on the parties. Secondly, the parties should not be in principle allowed to choose another body to resolve their dispute.[145]

The prohibition of choice may not arise just as a consequence of law but also of facts.[146] Thus, in certain cases the Court found that the availability of an alternative dispute resolution body may not preclude the admissibility of the referral for preliminary ruling. In *Consorci Sanitari del Maresme,*[147] the Court noted that the referring body's jurisdiction was optional as the person looking for a revision of public procurement case could lodge either an appeal to the referring body or an action to administrative courts.[148] However, in practice the direct administrative action was rarely used[149] and it thus satisfied the condition of compulsory jurisdiction.[150]

Similarly, in *Emanuel,*[151] the Court admitted reference by the Appointed Authority under the Trade Marks Act 1994. The Appointed Authority shared its jurisdiction to decide on appeals with either the High Court of Justice in England and Wales or the Court of Session in Scotland. The appellant was then unilaterally allowed to choose which body would hear their appeal.[152]

In *Danfoss,*[153] the Court held that the Industrial Arbitration Board had compulsory jurisdiction because one party could bring the case before the board 'irrespective of the objections of the other'. The jurisdiction therefore did not depend on the parties' agreement.[154] On this basis, the Court found in *Ascendi* that the *Tribunal Arbitral Tributário* had compulsory jurisdiction because it was based on law and not 'subject to the prior expression of the parties' will to submit their dispute to arbitration'.[155] The Advocate General also noted that the right to choose arbitration did not result from a person's 'own initiative but the wishes of the legislature

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[144] Case C-203/14 *Consorci Sanitari del Maresme*, Opinion of AG Jääskinen ECLI:EU:C:2015:445, paras 38-39.
[145] Von Papp (n 128) 1069.
[146] *Nordsee* (n 130) para 11.
[147] *Consorci Sanitari del Maresme* (n 125).
[148] ibid para 22.
[149] ibid para 24.
[150] ibid para 25.
[151] Case C-259/04 *Emanuel* ECLI:EU:C:2006:215, [2006] ECR I-3089.
[152] ibid paras 21-22.
[153] Case C-94/10 *Danfoss a Sauer-Danfoss* ECLI:EU:C:2011:674, [2011] ECR I-9963.
[154] ibid para 7.
[155] *Ascendi* (n 125) para 29.

which created two equal systems for settling disputes'.[156] As such, it would seem that the basis of law is the deciding factor.

However, that would make the condition of compulsory jurisdiction the same as the condition of establishment by law and therefore quite obsolete. Thus, I would argue based on *Danfoss* and its emphasis on the irrelevancy of objections at the beginning of the proceedings and I would draw the distinction between the two criteria along the lines of the time of the parties' agreement. At first, when the dispute resolution body is established by law and not by agreement, it is solely created as a special system capable of hearing cases. Later, at the point when one party actually brings a case before it, it has compulsory jurisdiction only when objections of the other party are irrelevant. That is, one party, or even just the dispute resolution body itself, can begin and essentially force the other party into proceedings in front of the particular body 'irrespective of the objections of the other'.

Regarding the first aspect of compulsory jurisdiction, that is the binding quality of the decision, the parties to investment arbitration proceedings have a general duty to comply with the award as a result of their submission of the dispute to arbitration. Often the procedural rules include this duty explicitly[157] when they state that the awards shall be 'binding on the parties'.[158] The same wording is incorporated in the ICSID Convention[159] and may be also already in the particular investment treaty.[160] The fact, that one of the parties to the proceedings is a state is mostly not an issue as generally the obligation to comply with the award is not restricted by sovereign immunity.[161] Therefore, the decision of tribunals in investment arbitration should ordinarily be binding.

The second aspect is more complicated because the investor can choose between bringing the case in front of the tribunal under the respective investment treaty or in front of the national courts.[162] Some commentators argue that investment arbitration tribunals therefore do not have compulsory jurisdiction.[163] However, others point out that only the arbitral tribunals provide the necessary neutrality as otherwise the state would be both the respondent and the court. This

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[156] *Ascendi*, Opinion of AG (n 137) para 40.
[157] Stefan Kröll, 'Enforcement of Awards' in Marc Bungenberg and others (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 1482-504, para 8.
[158] See eg United Nations Commission On International Trade Law, 'UNCITRAL Arbitration Rules', art 34(2) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> accessed 1 May 2021; International Chamber of Commerce, '2021 Arbitration Rules', art 35(6) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 1 May 2021.
[159] ICSID Convention, art 51(1).
[160] See eg Slovakia-Netherlands BIT, art 8(7).
[161] Kröll (n 157) para 11-13.
[162] Basedow (n 133) 378.
[163] Dimopoulos (n 12) 87.

would hold true even for intra-EU investment treaties where other considerations for investment arbitration may be diminished. The investor is therefore forced into choosing the jurisdiction of the investment tribunal by facts, if not by law.[164]

Moreover, parties to a dispute can almost always, at least in theory, choose their forum. They can opt out of court litigation and submit their dispute to commercial arbitration. Therefore, accepting the line of reasoning that just the theoretical availability of other forum leads to the lack of compulsory jurisdiction would, in the end, mean that even most courts would not have it.

I would thus argue that following the Court's reasoning in *Emanuel* and *Danfoss* the availability of choice of forum is not by itself detrimental as long as one party can unilaterally decide where the case will be heard. In case of investment arbitration, the investor can on its own choose to bring its claim to arbitration without any prior agreement between it and the State. It only unilaterally accepts the offer of arbitration provided by the State in the investment treaty and the State is at that point forced into proceedings in front of the arbitral tribunal without regard to its objections. Therefore, the second condition of compulsory jurisdiction should be fulfilled as well.

3.1.4. *Inter Partes* Proceedings and Judicial Nature of the Decision

The Court reiterates throughout its rulings that the proceedings in front of the referring court should be *inter partes*.[165] However, in *Dorsch Consult*[166] the Court considered the admissibility of a request for preliminary ruling by the German Federal Public Procurement Awards Supervisory Board (*Vergabeüberwachungsausschuß des Bundes*) which was not deciding a dispute between two parties but rather considered the jurisdiction of another administrative body following an application by a private company.[167] The Court acknowledged that the proceedings were not *inter partes*.[168] However, it also stated that this condition is not absolute and pointed to the importance of the fact that the parties have to be heard before a decision is made.[169] Thus, even though this criterion was not met the Court found that the Board was a court or tribunal under the Article 267 TFEU.[170]

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[164] Von Papp (n 128) 1069-70.
[165] For examples see cases in footnote 125.
[166] *Dorsch Consult* (n 125).
[167] ibid para 5.
[168] ibid para 30.
[169] ibid para 31.
[170] ibid para 38.

Moreover, the Court decided similarly in *Corsica Ferries*[171] that the Article 267 TFEU actually does not require that the proceedings before national court are *inter partes*. Although, an *inter partes* hearing may be beneficial to the proper administration of justice.[172] In later cases, the Court stressed that even though the Article 267 TFEU does not prescribe *inter partes* proceedings, there still has to be a real case pending and the court has to be 'called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'.[173] On this basis, the referring court in *Cartesio*[174] was found exercising judicial function regardless of the fact that the proceedings were not *inter partes*.[175] Therefore, even though the criterion of *inter partes* is often stated separately[176] it is in practice regarded more as an aspect of the judicial nature of the proceedings and does not have to be strictly fulfilled.

The condition of the judicial nature of the decision means that the court has to resolve a legal dispute as opposed to issuing an administrative decision.[177] According to the Court, the function of the referring body in the particular case is decisive not just on its general constitution. The Court specifically stated that 'a national body may be classified as a court or tribunal within the meaning of Article 267 TFEU, when it is performing judicial functions, but when exercising other functions, of an administrative nature, for example, it cannot be recognised as such'.[178] Moreover, the national determination of a body is not conclusive.[179]

The basic prerequisite of the investment arbitration is a real legal dispute between the parties[180] which is even *inter partes*. Therefore, the proceedings before and the decisions of the tribunals should be considered of judicial and not of administrative nature.[181]

3.1.5. Application of Rules of Law

The decision-making based on rules of law is generally defined negatively as a decision that is not made *ex aequo et bono*,[182] i. e. 'on the basis of what they consider to be fair and

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[171] Case C-18/93 *Corsica Ferries v Corpo dei piloti del porto di Genova* ECLI:EU:C:1994:195, [1994] ECR I-1783.
[172] ibid para 12.
[173] Case C-182/00 *Lutz and Others* ECLI:EU:C:2002:19, [2002] ECR I-547, para 13; Case C-210/06 *Cartesio* ECLI:EU:C:2008:723, [2008] ECR I-9641, para 56.
[174] *Cartesio* (n 173).
[175] ibid paras 56, 61.
[176] Case C-53/03 *Syfait and Others* ECLI:EU:C:2005:333, [2005] ECR I-4609, para 29; *Belov* (n 125) paras 38-39.
[177] *Cartesio* (n 173) para 57.
[178] *Belov* (n 125) para 40.
[179] *Consorci Sanitari del Maresme* (n 125) para 17.
[180] Waibel (n 132) paras 85-86.
[181] Basedow (n 133) 380.
[182] *Ascendi*, Opinion of AG (n 137) para 42; *Achmea*, Opinion of AG (n 82) para 123.

equitable'.[183] However, in *Almelo*,[184] the Court found that if a court reviewing an arbitral award should give judgment according to what appears fair and reasonable, it is still considered a court within the meaning of Article 267 TFEU. It argued that even in such a situation the court still has to reflect EU law based on the primacy and uniform application of EU law.[185] Furthermore, in *Dorsch Consult* the Court stated that the fact that the body can make its own rules of procedure is not detrimental as long as it has to apply specific rules of substantive law and basic procedural boundaries, such as duty to hear the parties, to decide by majority, or to give reasons to the decisions, are set out.[186]

The tribunals in investment arbitration generally decide disputes in accordance with rules of law.[187] They could be sometimes called by the agreement of the parties to rule on the case *ex aequo et bono*[188] but as long as they would still apply at least some rules of law, this fact should not be detrimental.

Generally, the procedure of the arbitration is set out by the procedural rules or the agreement of the parties and the tribunal can adopt its own rules only with regards to questions where both are silent. That is the case for all ICSID cases.[189] However, I would argue that even where the tribunal in non-ICSID cases could fully decide on its own rules it would still be bound by the general best-efforts duty to render an enforceable award.[190] As such the procedure would mainly have to comply with the requirements set out by the New York Convention[191] which provides protection to the basic procedural rights of the parties among its grounds for the refusal of enforcement.[192] Therefore, it sets out the basic procedural boundaries as required by *Dorsch Consult* and the power of the tribunal to adopt its own rules of procedure should in any case be in line with the requirements. All in all, the arbitral tribunals in investment arbitration should be thus always regarded as deciding based on the rules of law.

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[183] Waibel (n 132) para 88.
[184] Case C-393/92 *Gemeente Almelo and Others v Energiebedrijf IJsselmij* ECLI:EU:C:1994:171, [1994] ECR I-1477.
[185] ibid paras 23-24.
[186] *Dorsch Consult* (n 125) paras 32-33.
[187] Compare ICSID Convention, art 42(1); Netherlands-Slovakia BIT, art 8(6).
[188] Waibel (n 132) para 87.
[189] Sasson (n 134) para 149.
[190] Blackaby (n 2) ch 9, 506
[191] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention). Kröll (n 157) para 15.
[192] New York Convention, art V(I)(b); Blackaby (n 2) ch 11, 627.

3.1.6. Independence

In *Wilson*,[193] the Court defined the criterion of independence as having both an external and internal aspect. Externally, the dispute resolution body has to be 'protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them'.[194] It also encompasses the question of control as the body cannot take orders or instruction from any source and should not be in a hierarchical or subordinate position.[195] Therefore, the body has to be mainly independent from the administrative branch.[196]

Internally, the body has to be impartial towards the parties and their interests regarding the subject matter of the proceedings. In other words, impartiality means objectivity and absence of interest in the outcome of the proceedings.[197] Both the independence and impartiality have to be guaranteed by set rules that would 'dismiss any reasonable doubt' of the parties. The composition of the body and the rules of rejection and dismissal of the members are of particular concern.[198] They should be for example determined by express legislative provisions.[199]

In practice, the independence and impartiality of arbitrators in investment arbitration often comes under criticism.[200] However, structurally they are generally under obligation to be impartial and independent. The procedural rules for example commonly require arbitrators to disclose any information that may be detrimental to their independence and impartiality. Moreover, the IBA Guidelines on Conflicts of Interest in International Arbitration[201] provide more detailed explanation of what connections may or may not influence the independence and impartiality of arbitrators. Finally, once nominated arbitrators may be generally dismissed only based on a challenge alleging their lack of independence or impartiality.[202] Therefore, the independence of the arbitral tribunal in investment arbitration should be guaranteed.

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[193] Case C-506/04 *Wilson* ECLI:EU:C:2006:587, [2006] ECR I-8613.
[194] ibid para 51.
[195] *Consorci Sanitari del Maresme* (n 125) para 19.
[196] Robert Schütze, *An Introduction to European Law* (CUP 2012), 158.
[197] *Wilson* (n 193) para 52.
[198] ibid para 53.
[199] Case C-222/13 *TDC* ECLI:EU:C:2014:2265, para 32.
[200] Blackaby (n 2) ch 8, 445.
[201] International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration <www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed 1 May 2021.
[202] Sasson (n 134) paras 91-94.

3.1.7. Part of the Judicial System of the European Union

The last requirement used in the Court's case-law is the most problematic with regards to tribunals in investment arbitration and was ultimately the reason why the Court found in *Achmea* that the arbitration tribunal was not a court or tribunal of a Member State within the meaning of Article 267 TFEU.[203] The Court has already considered a few dispute resolution bodies with an international aspect. However, it has yet to precisely specify what conditions need to be fulfilled by a body to be situated within the EU judicial system.[204]

In *Parfums Christian Dior*,[205] the Court considered the Benelux Court of Justice (*Cour de Justice Benelux*) which is the highest court of Belgium, Netherlands and Luxembourg with regards to their common laws.[206] The Court stated that '[t]here is no good reason why' the Benelux Court of Justice as a court of several Member States should not be allowed to request preliminary rulings from the Court.[207] It especially pointed to the fact, that the Benelux Court of Justice ensures the uniform application of common laws by way of a preliminary ruling during the proceedings before the national courts.[208]

In this regard, the Court then interpreted the *Parfums Christian Dior* decision in the *Opinion 1/09* which analysed the agreement creating a unified patent litigation system. Accordingly, the Benelux Court of Justice is part of the 'judicial system of the European Union' because it is a court common to several Member States and thus the full effectives of EU law can be ensured.[209]

However, the Court also raised concerns regarding the unified patent litigation system itself. The so-called patents court would have an exclusive jurisdiction to decide on vast variety of actions regarding patents instead of national court and would have the duty to interpret and apply EU law.[210] It was supposed to be created based on an international agreement concluded by and between the EU, Member States, and third countries.[211] Therefore, it would be an independent international organisation separate of the EU and the Member States.[212] The Court also pointed to the liability of Member States for the infringement of EU law which serves to help protect the

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[203] *Achmea* (n 3) para 46.
[204] Pohl (n 104) 782.
[205] Case C-337/95 *Parfums Christian Dior v Evora* ECLI:EU:C:1997:517, [1997] ECR I-6013.
[206] ibid paras 15-17.
[207] ibid para 21.
[208] ibid para 22.
[209] Opinion 1/09 (n 52) para 82.
[210] ibid paras 72-73.
[211] ibid para 7.
[212] ibid para 71.

individual rights and extents also to incorrect rulings of national courts.[213] Whereas the Court concluded that the decisions of the patents court, as an international organisation, could not give rise to such liability of any Member State. Thus, the establishment of the patents court would be incompatible with the Treaties.[214]

In *Miles*,[215] the Court ruled on the admissibility of a request for preliminary ruling by the Complaints Board of the European School system. The European Schools were again an independent international organisation established by a convention concluded by and between the Member States and the EU.[216] The Court distinguished against the *Parfums Christian Dior* decision along the lines that the procedure before the Benelux Court of Justice was a step in the proceedings in front of the national courts. The Complaints Board on the other hand did 'not have any such links with the judicial system of the Member States' and was a body of an international organisation distinct of the EU and the Member States. Therefore, it found that the Complaints Board did not fulfil the criteria of Article 267 TFEU.[217]

All in all, it seems that a dispute resolution body does not need to be only a court of a single Member State but also of several of them. However, it cannot be a fully independent organisation with no links to the Member States because there would not be a Member State that could be held liable for any infringements of the EU law.

Since a tribunal in investment arbitration is by definition international and therefore strictly speaking not of a Member State there are two lines of thought possible. On one hand, the tribunal could be regarded a joint court of the states concluding the investment treaty[218] because it substitutes the national courts which would have otherwise had the jurisdiction to decide the disputes. Thus, unlike bodies of international organisations such as the Complaints Board of the European Schools, the tribunals are in that capacity part of the judicial system of a Member State.[219] This would also distinguish the tribunals in investment arbitration against the patents court in *Opinion 1/*09 as they would not be independent of the Member States but rather their joint responsibility. Therefore, the liability for breaches of EU law could be a joint liability of both of the Member States.[220]

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[213] ibid paras 84-86.
[214] ibid paras 88-89.
[215] *Miles* (n 127).
[216] ibid paras 4, 42.
[217] ibid paras 41-43.
[218] Von Papp (n 128) 1072-73.
[219] Basedow (n 133) 378-79.
[220] Hindelang, 'Circumventing Primacy of EU Law' (n 106) 204.

Moreover, the decisions of the tribunals are directly binding on individuals and the respondent States. Whereas the decisions of international organisations stick to the international level and in case of the Complaints Board have binding effect only within the organisation itself.[221] Finally, a link between the tribunal and the Member States can also be found through the supervisory function of the national courts during annulment, recognition, or enforcement proceedings.[222]

On the other hand, the tribunals may be considered as completely separate and independent entity from the states. This view was ultimately adopted by the Court in *Achmea* where it stated that it is the exceptional nature and therefore their independence from the states that is not enjoyed by national courts that leads to their establishment.[223] According to the Court, the tribunals in investment arbitration cannot be for this reason 'in any event' considered a court or a tribunal of a Member State under the Article 267 TFEU.[224]

The first solution would allow the tribunals to request the Court for a preliminary ruling. However, as much as it tries to distinguish between the international organisations and rely on some links to the courts of Member States, it does not appropriately address the main concern raised in the case-law. That is the liability of Member States for rulings of national courts[225] because this liability can only arise in regards to 'breaches of EU law, for which the State can be held responsible'.[226] The source of the liability is primarily EU law but can also be the national law as long as it provides for less strict conditions.[227]

The States contracting the investment treaty do not have the same amount of control and influence over the tribunals as they do over their national courts.[228] The State that is the respondent and whose courts are bypassed by the arbitration cannot by definition have any undue influence over the tribunal as it would compromise the tribunal's independence and impartiality. It has to stay equal to the private investor in the proceedings. Even worse, any other State that is party to the investment treaty does not play any role in the proceedings at all and has virtually no way to ensure that the tribunal would not breach the EU law.

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[221] ibid 203.
[222] Von Papp (n 128) 1073.
[223] *Achmea* (n 3) para 45.
[224] *Achmea* (n 3) para 46.
[225] Opinion 1/09 (n 52) para 86.
[226] Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* ECLI:EU:C:2019:630, para 40.
[227] ibid para 38.
[228] Pohl (n 104) 782.

Another possibility would be also to hold liable other States involved in the arbitration by way of proceedings for the annulment, recognition, or enforcement.[229] However, these States are responsible for the correct application of EU law by their national court, not of the tribunal, and again have no direct influence over it. There also may not be any Member States involved at this point because the arbitration or enforcement may be conducted in a third state or under the terms of the ICSID Convention.

I would therefore agree with the conclusion of the Court in *Achmea* to the extent that the tribunals in investment arbitration should not be generally regarded as part of the judicial system of any Member State. The reasoning would be that the Member States do not exercise any control over the tribunals and should not be considered within the realm of their responsibility. Therefore, as was the case in *Opinion 1/*09 the liability of Member States for any potential infringement of EU law could generally not arise. However, unlike the Court I would argue that this condition may be still fulfilled on a case-by-case basis. For example, if such a liability or other sufficient guarantees would be provided for by the national laws of the Member States which are parties to the investment treaty.

In conclusion, the arbitral tribunals in investment arbitration seem to fulfil all the general criteria of a court or tribunal under Article 267 TFEU. The main issue comes only at the point whether they should be considered tribunal 'of a Member State'. In this regard, I would unlike the Court argue that a general conclusion cannot be reached and a case-by-case analysis is needed to guarantee that there is always a Member State responsible and potentially liable for any infringements of EU law by the tribunal.

3.2. Preliminary Ruling Requested by a Reviewing National Court

In case of arbitration the compliance with EU law and its autonomy and thus with the Article 267 TFEU may be also guaranteed by other involvement of national courts of Member States. They can mostly come into play after a decision is rendered through setting aside and annulment proceedings or later during recognition and enforcement.[230] In such cases, it would be the courts that would be eligible to make the preliminary reference even if the tribunals could have not. However, this solution comes with some specific issues. Firstly, the participation of national courts of a Member State may not be always guaranteed. Secondly, even in cases where the

[229] *Achmea*, Opinion of AG (n 82) para 255.
[230] Fanou (n 86) 328.

courts would be involved the scope of the review would be quite limited and may not include compliance with EU law.

(i) Involvement of a Court or Tribunal of a Member State

The potential involvement of courts depends on whether we consider an ICSID or a non-ICSID award. The arbitration administered under the ICSID Convention is rather a self-contained regime and aims to exclude any involvement of domestic courts.[231] The awards can be annulled only through specific proceedings before an *ad hoc* Committee made up of arbitrators appointed by the Chairman of the ICSID Administrative Council.[232] Moreover, during the recognition and enforcement phase any review of the ICSID awards is generally forbidden as they should be treated as final judgments of courts in that State.[233] Nevertheless, the enforcement of the award may still be denied by the domestic courts if it would be precluded by reasons that would also apply to domestic judgments. One such generally accepted exception which is also explicitly mentioned in the ICSID Convention is the challenge on the grounds of sovereign immunity against execution.[234]

The non-ICSID awards on the other hand allow for recourse to domestic courts. First, the courts of the State where the arbitration is conducted decide on the setting aside or annulment of the award and then the courts of other States may rule about the recognition and enforcement.[235] However, the seat of the arbitration may be outside of the EU and it would be therefore courts of a third State deciding based on their *lex loci arbitri* regarding annulment or setting aside of the award.[236] Afterwards, the award may be also recognised and enforced in a third State thus circumventing EU judicial system altogether.[237]

However, the enforcement of awards in a non-respondent State is rather impractical as States traditionally rarely refuse to grant State immunity from execution to foreign States.[238] The Advocate General Wathelet in his Opinion to *Achmea* therefore suggested that this issue is only

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[231] Jean-Christophe Honlet, Barton Legum and Anna Crevon, 'ICSID Annulment' in Marc Bungenberg and others (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 1432-59, paras 1-3.
[232] ICSID Convention, art 52.
[233] ICSID Convention, art 54; Kröll (n 157) para 51.
[234] Eilmansberger (n 88) 427; Kröll (n 157) para 55.
[235] Blackaby (n 2) ch 10, 570.
[236] Pohl (n 104) 783.
[237] Hindelang, 'Circumventing Primacy of EU Law' (n 106) 198.
[238] Blackaby (n 2) ch 11, 658-60.

hypothetical and even in cases where the seat of arbitration is in a third State the investor has to in reality request the enforcement by courts of the respondent Member State.[239]

(ii) Scope of the Review

When the courts of Member States are then involved the scope of the review is usually quite limited by both the national and international law. As stated above, the ICSID awards can be generally reviewed purely on the grounds which would also apply to a judgment of a domestic court. The English High Court used this notion in July 2017[240] to stay the enforcement of the ICSID award in the *Micula*[241] case. There, the Commission forbade Romania the compliance with the award because it would amount to incompatible state aid.[242] The High Court thus said that if it allowed the enforcement of the award it would make a decision which would conflict with a decision of the Commission. As such it would be acting unlawfully against its obligation of sincere cooperation. It concluded that the stay of the enforcement did not breach the obligations of the United Kingdom under the ICSID Convention because 'a purely domestic judgment would be subject to the same limitation'.[243]

Nevertheless, the decision was ultimately overruled in February 2020 by the United Kingdom Supreme Court which found that the United Kingdom acceded to the ICSID Convention prior to the accession to the European Union and therefore the Article 351 TFEU applied. Thus, the obligation of the United Kingdom to enforce the award cannot be affected any obligation under the Treaties and there was then no ground for the denial of enforcement.[244]

Some commentators also argue that the Article 54(3) ICSID Convention generally allows for a limitation to the enforcement of ICSID awards incompatible with EU law. However, this view is not generally accepted.[245] This means that without any change to the ICSID system the revision of the compliance of the award with EU law is limited.

With regards to non-ICSID awards, the national law of the State of the seat of the arbitration applies during the annulment or setting aside.[246] The proceedings and the scope of review

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[239] *Achmea*, Opinion of AG (n 82) fn 200.
[240] *Micula & Ors v Romania & Anor* [2017] EWHC 31 (Comm).
[241] *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Final Award (11 December 2013).
[242] *Micula* EWHC (n 240) [7].
[243] *Micula* EWHC (n 240) [131]-[132].
[244] *Micula & Ors v Romania* [2020] UKSC 5 [84]-[86].
[245] Von Papp (n 128) 1060.
[246] Blackaby (n 2) ch 10, 577-78.

therefore technically vary from State to State. However, the national legislations are mostly inspired or even directly copied from the New York Convention or the UNCITRAL Model Law[247] and therefore offer fairly similar grounds for a challenge[248] which fall into one of three categories – jurisdictional issues, grave breaches of procedural rules, or mistakes in the application of law.[249] One such common ground is the violation of public policy.[250]

The enforcement of non-ICSID awards, like the enforcement of awards in commercial arbitration, is then governed mainly by the New York Convention.[251] There, the grounds for the refusal of enforcement, and thus for the review by the court, are again quite limited. Nevertheless, they notably include the annulment or setting aside of the award in the country of origin[252] and the violation of public policy.[253]

(iii) The Solution in Commercial Arbitration

Despite these two main concerns, the Court applied this solution in *Nordsee*[254] with regards to commercial arbitration. In this case, the Court firstly found inadmissible the request for preliminary ruling referred to the Court by an arbitral tribunal established by a private contract between individuals.[255] As such, it became a landmark case that resolved any discussions whether the arbitral tribunals in commercial arbitration tribunals could request preliminary rulings.[256] Then, the Court established that it is the national courts when they exercise auxiliary or supervisory functions with regards to the arbitration which can request a preliminary ruling[257] and thus protect autonomy of EU law.

In *Eco Swiss*,[258] the Court further analysed the relationship between arbitral tribunals in commercial arbitration and national courts. The proceedings before the referring court concerned

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[247] United Nations Commission On International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006' (UNCITRAL Model Law) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 1 May 2021.
[248] Lars Markert and Helene Bubrowski, 'National Setting Aside Proceedings in Investment Arbitration' in Marc Bungenberg and others (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 1460-81, para 3.
[249] Blackaby (n 2) ch 10, 581.
[250] Markert and Bubrowski (n 248) para 17.
[251] Kröll (n 157) para 15.
[252] New York Convention, art V(1)(e).
[253] New York Convention, art V(2)(b).
[254] *Nordsee* (n 130).
[255] ibid paras 7, 16.
[256] Basedow (n 133) 370.
[257] *Nordsee* (n 130) para 15.
[258] Case C-126/97 *Eco Swiss* ECLI:EU:C:1999:269, [1999] ECR I-3055.

the annulment of a commercial arbitration award on the basis of a breach of public policy.[259] This was one of only a few grounds for annulment under the national law. The referring court therefore asked the Court whether the EU competition rules in Article 101 TFEU could be considered public policy.[260] The Court firstly acknowledged that the limited scope of revision of an arbitral award by courts during annulment or recognition proceedings was justified by the interest in efficiency of arbitration.[261] It then found that the competition rules 'constitute a fundamental provision which is essential to the accomplishment of the tasks entrusted to the Community'[262] and therefore they should have been considered a matter of public policy under national law and even within the meaning of Article V(II)(b) New York Convention.[263]

The Court reiterated in *Mostaza Claro*[264] the premise that the exceptional circumstances in which an arbitral award may be annulled or not recognised is justified and that public policy encompasses also some EU rules.[265] On this basis, it then found that the consumer protection rules are essential and the arbitration awards based on arbitration agreements which include unfair terms should be annulled.[266]

(iv) Application of the Eco Swiss Doctrine to Investment Arbitration

Thus, as the Court summarized in *Achmea*, the scope of review of arbitral awards can be limited as long as fundamental provisions of EU law can be examined and preliminary ruling requested.[267] However, according to the Court this doctrine cannot be used on investment arbitration because it is based on 'a treaty by which Member States agree to remove [the disputes] from the jurisdiction of their own courts' rather than on 'free expressed wishes of the parties'.[268] At first glance, it therefore seems that the determining factor is the consent of the parties.[269] Nevertheless, as discussed above consent is still inherent even to investment arbitration because the investor accepts the standing offer of the state to arbitrate included in the investment treaty.

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[259] ibid para 14.
[260] *Eco Swiss* (n 258) para 31.
[261] ibid para 35.
[262] ibid para 36.
[263] ibid paras 37-39.
[264] Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675, [2006] ECR I-10421.
[265] ibid paras 34-35.
[266] ibid paras 36-39.
[267] *Achmea* (n 3) para 54.
[268] *Achmea* (n 3) para 55.
[269] Fanou (n 86) 329.

It is also possible to focus on the treaty basis of investment arbitration mentioned by the Court. Along this line, the State in investment arbitration removes the jurisdiction from its own courts by way of a treaty with another State. On the other hand, in commercial arbitration the State removes the jurisdiction by its own domestic law. While this is a valid distinction between the two, it remains unclear from the Court's reasoning why it means that the limited revision is sufficient with regards to one but not to the other.[270]

Some commentators therefore quite creatively interpret the decision and argue that the real issue is that the Member States by way of an investment treaty opted out of their obligation of mutual trust. That would also mean that this distinction only applies to intra-EU BITs as third states do not have such obligation.[271] However, as much as this is a strong point the Court in *Achmea* summarizes that the dispute resolution system in the investment treaty 'call[s] into question *not only* the principle of mutual trust between the Member States *but also* the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU'.[272] Therefore, the Court clearly separates the breach of the principle of the mutual trust and Article 267 TFEU as two different issues which should not be mixed.

Another view is to single out the obligation to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' under Article 19(1) TEU which binds the Member States concluding an investment treaty but does not concern the private individuals in commercial arbitration.[273] That is again true but the Member States actually modify the remedies in the same way in case of both types of arbitration. In commercial arbitration they just do it by way of national arbitration law and in investment arbitration through a treaty with another state which is often times also incorporated by way of national law.

Therefore, even though the Court in *Achmea* was quite clear that the *Eco Swiss* doctrine is inapplicable to investment arbitration the reasoning is unclear at best. I agree that investment arbitration is certainly very different from its commercial counterpart as it concerns itself with the legality of state regulatory action and is even sometimes likened to domestic administrative court systems.[274] But as long as it is not administered under the ICSID Convention, which was

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[270] Pohl (n 104) 787.
[271] ibid 788.
[272] *Achmea* (n 3) para 58 (emphasis added).
[273] Mads Andenas and Cristina Contartese, 'EU autonomy and investor-state dispute settlement under *inter se* agreements between EU Member States: *Achmea*' (2019) 56 CML Rev 157, 180.
[274] Von Papp (n 128) 1059.

the case in *Achmea*,[275] the remedies provided by Member States to guarantee the compliance of the award with the EU law are the same as in case of commercial arbitration. The treaty basis or even some differences in consent do not change that.

Altogether, I would argue that there should be made a strong distinction between non-ICSID and ICSID investment arbitration. Concerning the former, I would argue that its differences from commercial arbitration do not justify non-applicability of the *Eco Swiss* doctrine concerning the breach of Article 267 TFEU and the Court should better explain it in its future rulings[276] why the review of domestic courts during annulment and enforcement proceedings could not suffice in investment arbitration.

The latter is on the other hand as explained above a self-contained system which does not allow for almost any scrutiny by the courts of Member States and as such the potential request for preliminary ruling of the courts would not suffice for the compliance with Article 267 TFEU right now. Nevertheless, an argumentation similar to that of the English High Court may be a possible way for the domestic courts to review even an ICSID award on the grounds of EU law in the future. The Supreme Court was after all overruling the decision in a very specific position as the United Kingdom was in middle of its transition period after the withdrawal from the European Union.

[275] *Achmea* (n 3) para 4.
[276] The Court may have its first chance in response to the preliminary ruling request made by the Swedish Supreme Court in the setting aside proceedings regarding *PL Holdings v Poland* which is discussed in the section II.2.1 (*The EU Courts*) below.

4. Mutual Trust

The mutual trust or rather the principle of mutual trust is a hotly debated topic which spans far beyond its modest inclusion in this thesis.[277] Some authors even dispute its existence as a principle as it is missing from the Treaties as well as *travaux préparatoires* and policy documents regarding the AFSJ.[278] Others call it the 'essential building block' of the legal system of the EU and elevate it to the level of a structural constitutional EU principle.[279] I will therefore only shortly summarize the inception of the mutual trust in the Court's case-law and what it might currently encompass, then look at its limitations and issues, and finally analyse its application to investment treaties.

4.1. The Inception and Foundations of the Mutual Trust

As mentioned above the principle of mutual trust cannot be found in the Treaties. Therefore, like the principle of autonomy it emerged in decisions of the Court. The concept of trust or confidence[280] between Member States appeared in the Court's case-law already in the 1970s.[281] However, in was only in *Turner*[282] where the Court mentioned the *principle* of mutual trust for the first time.[283] The Court used it with relation to the 1968 Brussels Convention[284] and stated that an inherent characteristic of the principle is that domestic courts of each Contracting State to the 1968 Brussels Convention may interpret it with the same authority.[285] In *NS,*[286] the Court then pronounced that when defining the limitation of the mutual trust the '*raison d'être* of the European Union' was at stake. It also explicitly extended the concept of mutual trust beyond just the AFSJ to the asylum law when it stated that the Common European Asylum System is based upon it.[287] Since then, the frequency of use of the mutual trust by the Court has only increased.[288]

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[277] For more thorough analysis see the articles cited in this section.
[278] Francesco Maiani and Sara Migliorini, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) 57 CML Rev 7, 11-14, 43.
[279] Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2 European Papers 75, 76.
[280] The terms 'mutual trust' and 'mutual confidence' used by the Court are interchangeable and both are equivalent to the French '*confiance mutuelle*'. For a more in-depth discussion see Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93, 95.
[281] ibid; Prechal (n 279) 78.
[282] Case C-159/02 *Turner* ECLI:EU:C:2004:228, [2004] ECR I-3565.
[283] Maiani and Migliorini (n 278) 29.
[284] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32 (1968 Brussels Convention).
[285] *Turner* (n 282) para 25.
[286] Case C-411/10 *NS and Others* ECLI:EU:C:2011:865, [2011] ECR I-13905.
[287] ibid para 83.

Nevertheless, the first large theoretical explanation of the principle came in the *Opinion 2/13*.[289] The Court doubled down on its dedication to the principle when it called it 'of fundamental importance' to the EU law because it enables the creation and maintenance of the area without internal borders. It also established the basic obligation that stems from the principle of mutual trust which is 'to consider all the other Member States to be complying with the EU law'.[290] The Court even spoke of the 'obligation of mutual trust'.[291] It also explained that this entails in particular two negative obligations of the Member States. Firstly, the Member States may not demand higher standards of the protection of fundamental rights than provided by the EU law. Secondly, the Member States cannot check, except for exceptional cases, whether other Member States observe fundamental rights in specific cases.[292]

However, the scope of these obligations is unclear. The Court itself expanded on the principle of mutual trust in the context of the fundamental rights. In *Opinion 1/17*, the Court interpreted its previous case-law and explicitly stated that the obligation includes the right to an effective remedy before an independent tribunal pursuant to the Article 47 of the Charter.[293] On the other hand, for example the Court's judge Prechal argues that the general presumption of compliance with the EU law does not limit itself just to the observance of the fundamental rights and the law regarding the AFSJ but it is a general obligation. As such, it would in her view span all areas of the EU law including even the Treaty freedoms and the obligation to make preliminary ruling references.[294] When establishing the scope it does not help that the actual source of the principle of mutual trust is ill-defined as well.

In the *Opinion 2/13,* the Court alluded to the Article 2 TEU when it stated that the fact that the Member States share a set of common values 'implies and justifies the existence of mutual trust' that the values and the EU law which implements them will be observed.[295] On this basis, the President of the Court Lenaerts argues that the principle of equality under the Article 4(2) TEU provides the basis for the principle of mutual trust. Pursuant to that principle

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[288] Maiani and Migliorini (n 278) 29.
[289] In the words of the former judge of the Court Timmermans, the principle of mutual trust made a 'quantum leap' in the Opinion. Christiaan Timmermans, 'How Trustworthy is Mutual Trust? Opinion 2/13 Revisited' in Koen Lenaerts and others (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019), 26.
[290] Opinion 2/13 (n 56) para 191.
[291] ibid para 194.
[292] ibid para 192; Koen Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust' (2017) 54 CML Rev 805, 813.
[293] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (Charter); Opinion 1/17 (n 110) para 128.
[294] Prechal (n 279) 82-83.
[295] Opinion 2/13 (n 56) para 168.

the Member States are all treated equally irrespective of their size, economic power, or date of accession. They are also all equally committed to democracy, fundamental rights and the rule of law. As such, considering that they are all similarly committed to the same goals and values they should trust each other when trying to achieve them.[296]

The former judge of the Court Timmermans, on the other hand, uses the Court's mention of Article 2 TEU to argue that the 'legal basis is to be found in a deeper layer than the EU Treaties'. He focuses on the fact that the Court called the recognition of the common values a 'fundamental premiss' of the legal structure of the EU. As such, this premiss found in the very foundations of the EU justifies the mutual trust between the Member States, not any particular provision of the Treaties.[297] This is also supported by the strong constitutional language the Court uses to define the mutual trust and a 'certain emotional connotation' the term comes with.[298]

The last view is that the principle of mutual trust is only a by-product or part of the principle of sincere cooperation[299] as specified in the Article 4(3) TEU.[300] In short, the principle obliges the Member States to 'take any appropriate measures' to ensure their compliance with the EU law and to refrain from anything that could undermine the objectives of the EU.[301] This approach seems to be on its face value adopted by the Court since in *Achmea* it pointed to the mutual trust as a prerequisite for the breach of the principle of sincere cooperation.[302] However, as I will argue in the next section, the use of mutual trust in *Achmea* points beyond it.

In any case, the mutual trust is a fundamental principle of the EU law[303] because it ensures that the decisions of authorities of Member States do not become essentially ineffective just by the exercise of the freedom of movement within the EU.[304] It is thus quite understandably used the most in the law of the AFSJ[305] where it is together with the principle of mutual recognition the cornerstone of the civil and criminal judicial cooperation.[306] The mechanisms of the judicial

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[296] Lenaerts (n 292) 808-809.
[297] Timmermans (n 289) 26-27.
[298] ibid 29.
[299] The term 'sincere cooperation' is used as an equivalent to the term 'loyal cooperation'. For a discussion why they mean the same see Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014), 11-12.
[300] Thérèse Blanchet, 'Aie confiance! – La confiance mutuelle peut-elle se décréter?' in Jenő Czuczai and Frederik Naert (eds), *The EU as a Global Actor - Bridging Legal Theory and Practice* (Brill | Nijhoff 2017), 184; Prechal (n 279) 92.
[301] TEU, art 4(3). For a thorough discussion of the principle see Klamert (n 299).
[302] *Achmea* (n 3) para 58.
[303] Clemens Ladenburger, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice: Some Reflections on its Corollaries' in Koen Lenaerts and others (eds), *An Ever Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019), 172; Timmermans (n 289) 27.
[304] Lenaerts (n 292) 809.
[305] Cambien (n 280) 96.
[306] Prechal (n 279) 76.

cooperation in AFSJ as they stand simply would not function without the mutual trust between the Member States.[307] As mentioned before the Court also explained that the Common European Asylum System is based on mutual trust.[308] Finally, the principle of mutual trust is as prerequisite of mutual recognition instrumental in the law of the internal market as well.[309]

The principle is thus also tightly connected with the mutual recognition. They were even sometimes used interchangeably.[310] However, they are quite different concepts. The mutual recognition emerged in the *Cassis de Dijon*[311] decision which established that the Member States must recognize the national rules imposed on products under national laws of the other Member States.[312] It has since been an invaluable instrument in the removal of barriers to the fundamental freedoms within the internal market[313] by allowing for the recognition of professional qualifications, product requirements and more across the Member States.[314] Nowadays, the principle also means that the decisions of judicial bodies should be recognized and enforced across the EU.[315]

In conclusion, it might be rightly questioned whether trust can even be a legal principle[316] but the principle of *mutual* trust has been firmly established in the Court's case-law as one of the extra-Treaty fundamental principles of the EU law. It is mainly referred to in the context of the fundamental rights and the mutual recognition within the AFSJ and internal market. However, it may encompass a much broader obligation to trust other Member States that they comply with any provisions of EU law. Finally, its possible sources also suggest that the mutual trust is connected to the fact that the Member States share a set of common values and might be arising from the very basic values and foundations of the EU judicial system itself.

4.2. The Limitations of Mutual Trust

Even though the principle of mutual trust is, as established above, a constitutional principle of fundamental importance to the EU legal system, its reach is still not without boundaries. After

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[307] Timmermans (n 289) 25.
[308] *NS* (n 286) para 83.
[309] Cambien (n 280) 110.
[310] ibid 94.
[311] Case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42, [1979] ECR 649.
[312] Cambien (n 280) 98.
[313] Matthias Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 J Priv Intl L 64, 76.
[314] Prechal (n 279) 77.
[315] Lenaerts (n 292) 810.
[316] Cambien (n 280) 112.

all, the principle speaks of mutual trust, it does not prescribe 'unlimited'[317] or 'blind'[318] trust. It is inherent to trust that it must be 'earned'[319] and always 'can be lost'.[320] Thus, some secondary law instruments include public policy clauses which allow Member States to refuse recognition of foreign decisions. The Court held that on this basis the Member States may not allow the recognition or enforcement of a decision if it would be 'at variance to an unacceptable degree' with the legal system so that it would 'infringe a fundamental principle.[321] Even in cases, when such public policy clauses are missing the fundamental rights may pose a limit to the mutual trust between the Member States.[322] The Member States may therefore exceptionally 'distrust' each other if it is necessary for the protection of fundamental rights.[323]

The mutual trust is therefore not a given and nowadays it seems that the common trust between the Member States regarding fundamental principles is not very high.[324] As discussed in the previous section the principle of mutual trust may have different sources. However, it is always connected to the common values under the Article 2 TEU. In the Court's words, the fact that the Member States share the values under the Article 2 TEU is 'the fundamental premiss' which justifies the existence of mutual trust between the Member States.[325] The Article 7 TEU then provides protection to those values. It contains the procedure which allows the investigation of the possible serious breaches of the values under the Article 2 TEU by the Member States and even the imposition of sanctions for such breaches.[326]

In December 2017, the procedure under Article 7 TEU was triggered by the Commission for the first time when it submitted a reasoned proposal regarding the rule of law situation in Poland.[327] Of particular concern was the undermining of the independence of the judiciary and in the Commission's view the mutual trust may have been adversely affected.[328] Similarly, in September 2018 the European Parliament triggered the Article 7 TEU procedure against Hungary citing again concerns about the state of the independence of the judiciary, the rule of

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[317] ibid 103.
[318] Prechal (n 279) 85.
[319] Lenaerts (n 292) 837.
[320] Timmermans (n 289) 34.
[321] Case C-619/10 *Trade Agency* ECLI:EU:C:2012:531, para 51.
[322] Prechal (n 279) 86-90.
[323] Ladenburger (n 303) 164.
[324] ibid 165.
[325] Opinion 2/13 (n 56) para 168.
[326] TEU, art 7.
[327] European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland' COM (2017) 835 final <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-835-F1-EN-MAIN-PART-1.PDF> accessed 25 March 2021
[328] ibid 38.

law, and the fundamental rights. The European Parliament also added that the breach of the values under the Article 2 TEU may impact the mutual trust between the Member States.[329] Neither of these proceedings has come to any conclusion yet. However, I would argue that even the simple initiation of these proceedings points to a certain level of distrust at least between some of the Member States.

Moreover, looking away from just the formal procedure under the Article 7 TEU, there are systematic deficiencies in the judicial systems of some Member States. The Commission itself points out these issues in its annual European Justice Scoreboard. The perceived independence of judiciary is of special concern. In 2020 for example, most companies perceived the independence of courts and judges as good only in thirteen Member States.[330] Particularly noteworthy is that in Slovakia, the respondent state in the *Achmea* arbitration, less than 20% of companies considered the judiciary to be independent. The main reason for that were possible inferences or pressures from the government[331] which is one of the risks investors try to avoid by using the investment arbitration. The adherence to the values required for the mutual trust is therefore not as spotless as it might seem from the Court's decisions.

In conclusion, the principle of mutual trust is not absolute and always has to be weighed against the protection of the fundamental rights. Recently, its existence in the real world has been to some extent question by the initiation of the Article 7 TEU proceedings against Poland and Hungary. This only added to sometimes severe defects in the judiciaries in some Member States and may undermine the mutual trust between the Member States.

4.3. The Implications of Mutual Trust for Investment Treaties

When looking at the principle of mutual trust with regards to investment treaties, it has to be firstly pointed out that the principle has its place only between Member States. Thus, unlike the previous conditions of the Article 344 TFEU and the preliminary ruling procedure, it cannot be possibly invoked when considering the extra-EU BITs. As pointed out by the Court in the

[329] European Parliament, 'Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' P8_TA (2018) 0340 <www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf> accessed 25 March 2021.
[330] European Commission, *The 2020 EU Justice Scoreboard* (Publications Office of the European Union 2020) <https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2020_en.pdf> accessed 25 March 2021, figure 46.
[331] ibid figure 47.

Opinion 1/17 it is not applicable to the relations between the EU and a third State.[332] As such, any further conclusions may only affect the intra-EU BITs between Member States.

In *Achmea*, the Court referred to the principle of mutual trust twice. Firstly, in its general considerations[333] and then when it concluded that the arbitration clause in the Netherlands-Slovakia BIT 'call[ed] into question' the principle and in turn the principle of sincere cooperation was breached. It provided only a brief reasoning suggesting that the issue is that the Member States submitted the disputes to a dispute settlement body which was not part of the judicial system of the EU.[334] Therefore, it is not quite clear why the mutual trust was breached in the context of the investment arbitration.

The Commission in its submission in the *Achmea* arbitration suggested that the submission of disputes to arbitration 'reveals mistrust in the courts of EU Member States'.[335] However, that may only mean that the courts are not trusted as the most efficient means of dispute settlement.[336] Moreover, as pointed out by the Dutch government in the *Achmea* pleadings and adopted by the Advocate General Wathelet the arbitration clause does not by itself imply that the Dutch and Slovak governments did not trust one another that they would not comply with the EU law or not protect the fundamental rights.[337]

It is rather the investors who may not be confident in the independence and impartiality of the domestic courts[338] when it comes to deciding cases between the State and a foreign investor.[339] The investment treaties therefore introduced investor-State arbitration to allow the investors to directly sue sovereign states in a neutral forum without reliance on the support and will of their home State. This was in turn supposed to increase the amount of foreign investments.[340] The arbitration also provided other general advantages such as the use of a common rather than foreign language, easier international enforcement of the final award,[341] and the choice of arbitrators with special expertise.[342] Therefore, the provision of the arbitration as an alternative merely meant that the contracting States wanted to attract more foreign investors by

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[332] Opinion 1/17 (n 110) para 129.
[333] *Achmea* (n 3) para 34.
[334] *Achmea* (n 3) para 58.
[335] *Achmea,* Award on Jurisdiction (n 17) para 185.
[336] Fanou (n 86) 330.
[337] *Achmea*, Opinion of AG (n 82) para 263.
[338] As discussed in the previous section, this may still be a very valid worry even in today's EU.
[339] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2012), 217.
[340] The support of the home State may take forms of the diplomatic protection or the so-called 'gunboat diplomacy'. See Blackaby (n 2) ch 8, 441-445; Gaffney and Akçay (n 10) paras 15-17.
[341] This advantage is even more pronounced in case of investor-State arbitration as opposed to commercial arbitration thanks to the possible use of the ICSID Convention.
[342] For those and other general reasons for the choice of arbitration see for example Blackaby (n 2) ch 1, 28-31.

addressing their concerns. It did not by itself signify that the States themselves did not trust each other that their respective courts would not uphold fundamental rights. As such, I would argue that, unlike for example a refusal of the recognition of a foreign court judgement, the arbitration clause in investment treaties does not counter the mutual trust between Member States. This is also supported by the wording used by the Court which confined itself into concluding that the principle of mutual trust is 'called into question' not breached.

However, that leaves the question what did the Court actually mean by its reference to the principle. As Dimopoulos concludes based on the history and evolution of the investment treaties, they arose from a general mistrust between the legislature and judicature of the contracting states and as such they run contrary to the values upon which the EU is based.[343] The Member States may therefore uphold their obligation of mutual trust and consider that other Member States comply with the EU law. But it is already the fact that the Member States need a special treaty that provides protection to their investors which runs against the idea that all Member States share the same values and work together towards the same goals. In my view, the Court thus did not use the mutual trust as a principle that was to be breached per se but rather it used it as a red thread going throughout and supporting the reasoning of the judgment.[344] It employed it to hint at the ideological grounds of the EU which run contrary to the idea of a parallel system of special intra-EU treaties protecting investors.

In conclusion, the Court provides barely any explanation as to why the mutual trust between the Member States should be put in question by the arbitration clauses in intra-EU BITs. In fact, the investors are the ones who may not trust the judicial systems of a foreign Member States and therefore may not invest there. To resolve these concerns, the Member States thus provide the investors with the possibility of arbitration. However, that does not by itself mean that the Member States do not trust each other that they comply with the EU law and observe fundamental rights. They just aim at increasing the amount of the incoming investments. As such, I would conclude that the principle of mutual trust is not breached by the arbitration clauses in the intra-EU BITs and the Court used it only to support its other arguments and point at the ideological differences between the investment treaties and the EU.

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[343] Dimopoulos (n 12) 92.
[344] For a discussion in the similar direction see also Pohl (n 104).

5. Summary

The autonomy of the EU judicial system is one of the basic principles of the EU law which came to be already during the early judgments of the Court. It was used mainly to protect the Court's own jurisdiction against incursion. However, the Court recently extended its protection to the jurisdiction of the national courts as well. The source of the principle can be found mainly in the Article 344 TFEU and the preliminary ruling procedure in the Article 267 TFEU. In *Achmea* the Court also underlined it by the principle of mutual trust. It is therefore paramount to analyse these provisions to see whether the arbitration clauses in intra-EU BITs are incompatible with the autonomy of the EU law or not.

The application of the Article 344 TFEU can be divided into two aspects. Firstly, whether it generally concerns disputes between investors and Member States. Secondly, whether arbitration tribunals apply or interpret the EU law. With regards to the first one, the Court made clear the Article does not encompass disputes between individuals and avoided addressing the individual versus State disputes in its Opinion regarding the ECHR. With that in mind, I argued that the Court failed to sufficiently explain in *Achmea* why it considered the Article 344 TFEU to apply to the investment arbitration. Concerning the second aspect the Court in *Achmea* relied on the particular wording of the arbitration clause and then in the *Opinion 1/17* it introduced the possibility of safeguards that would protect the autonomy of the EU law whilst allowing for an independent arbitration court. As such, I argued that the *Achmea* judgment cannot be easily reused to other intra-EU BITs.

The preliminary ruling procedure under the Article 267 TFEU provides for issues as well. In my view, the arbitral tribunals generally fulfil the prerequisites to make a reference to the Court. The only problematic condition is the inclusion in the judicial system of the EU. However, that can still be met on a case-by-case basis. More importantly, the Court used an unpersuasive criterion of consent when differentiating between the investment arbitration and commercial arbitration. Therefore, I do not agree with the Court and believe that the *Eco Swiss* doctrine should be usable at least to non-ICSID cases and as a result those should not be found in violation of the Article 267 TFEU.

Lastly, the use of the principle of mutual trust is questionable as the investment arbitration serves the purpose of attracting investments and of reducing the risks in view of the foreign investors. It therefore cannot be inferred that the States themselves do not trust each other and in any case the validity of the principle is called into question by the rule of law situation in some

Member States. The principle thus runs through *Achmea* as a connecting topic rather than a standard that could be breached.

All in all, the argumentation and reasoning of the Court is lacking on several fronts. It used broad concepts that would suggest that the *Achmea* judgment could be easily reused in case of other intra-EU BITs. However, the Court then relied on the particular wording the arbitration clause or completely disregarded issues raised in the jurisprudence or by the Advocate General Wathelet in his Opinion. This is most apparent in the case of the applicability of the *Eco Swiss* doctrine where the Court in my view failed to properly distinguish the investment arbitration from commercial arbitration. As such, the judgment introduced more questions than answers and in my opinion might see pushback not just from the arbitral tribunals but also the national courts.

II. The Aftermath

As discussed in the previous part, the ruling in *Achmea* was quite clear. The arbitration clause in the Netherlands-Slovakia BIT is incompatible with the EU law. However, the reasoning brought more questions than answers when it comes to the treatment of investment arbitration under the EU law in general. The decision did concern itself specifically only with the Netherlands-Slovakia BIT but the Court used very general terms and principles when reaching its conclusion.[345] Namely, it concluded that a provision 'such as' the arbitration clause in the Netherlands-Slovakia BIT is precluded by the EU law.[346] The scope of the decision's application was and to this day is therefore debated.[347]

The Commission which understandably continued with its efforts against all intra-EU BITs championed a broad interpretation of the ruling early on. In July 2018, it issued a Communication aiming to reaffirm that cross-border investors are still protected under the EU law. There it suggested that it considers *Achmea* to be applicable to arbitration clauses in all intra-EU BITs. It also reiterated that the existing intra-EU BITs should be for the sake of legal certainty terminated.[348]

This was followed by the three political statements of the Member States. On 15 January 2019 the first twenty-two Member States issued their declaration on the legal consequences of the *Achmea* judgment.[349] Then on the next day Finland, Luxembourg, Malta, Slovenia, and Sweden together[350] and Hungary separately[351] issued two declarations of their own. They all

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[345] Julian Scheu and Petyo Nikolov, 'The setting aside and enforcement of intra-EU investment arbitration awards after Achmea' (2020) 36 Arb Intl 253, 256-259.
[346] *Achmea* (n 3) para 60.
[347] See Scheu and Nikolov (n 345), 255; Gustavo Guarín Duque, 'The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions' (2020) 37 J Intl Arb 797, 802; Lavranos (n 15), 199 and the articles cited there. Particularly discussed is the possible of extension of the decision on the intra-EU disputes brought under the Energy Charter Treaty as well.
[348] European Commission, 'Commission provides guidance on protection of cross-border EU investments – Questions and Answers' (19 July 2018) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_4529> accessed on 5 April 2021.
[349] 'Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union'<https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf> accessed 3 April 2021.
[350] 'Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union' <www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> accessed 3 April 2021.
[351] 'Declaration of the Representative of the Governments of Hungary, of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union' <https://2015 2019.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf> accessed 3 April 2021.

extended the application of the *Achmea* to all intra-EU BITs and found that any arbitration tribunal formed under an intra-EU BIT lacked jurisdiction 'due to a lack of valid offer to arbitrate by the Member State'. The Member States also undertook to ask any courts to set aside or not enforce any existing arbitral awards rendered in arbitration proceedings under an intra-EU BIT and informed investors that no such further arbitration proceedings should be initiated. However, in reality there were still new arbitration proceedings under intra-EU BITs starting in 2019.[352]

Finally, the Member States pronounced that they will terminate all intra-EU BITs and make best efforts to ratify any relevant agreements until the 6 December 2019.[353] In October 2019, the Member States agreed on the text of the plurilateral termination agreement.[354] In the leaked draft all twenty-eight Member States were participating.[355] Nevertheless, the final Termination Agreement[356] was signed on 5 May 2020 by only twenty-three Member States. It then entered into force on 29 August 2020.[357] As a result the Commission threatened to initiate infringement proceedings against Finland and the United Kingdom.[358] Interestingly, it did not do the same against the other non-participating Member States.[359]

The legal commentators were therefore unsure about the impact of *Achmea* while the Commission and the Member States adopted a broad interpretation and pushed for the termination of the intra-EU BITs. In the next sections, I will firstly look at the practice of arbitral tribunals and their treatment of the *Achmea* decision so far. Then, I will analyse the decisions of

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[352] United Nations Conference on Trade and Development (n 1) 3.

[353] The main reason why the Member States issued separate declarations is because of the wording regarding the Energy Charter Treaty. The interpretation of *Achmea* in the main declaration extents its effects also to the intra-EU disputes brought under the Energy Charter Treaty which would thus be incompatible with the EU law. The two separate declarations rather state that it is 'inappropriate' to express any opinion in this regard without a specific decision of the Court concerning the Energy Charter Treaty. The Hungary also specifically added that *Achmea* has in its view no effect on the Energy Charter Treaty at all. Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

[354] European Commission, 'EU Member States sign an agreement for the termination of intra EU bilateral investment treaties' (05 May 2020) <https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en> accessed 4 April 2021.

[355] Damien Charlotin, 'Revealed: Previously-Unseen Draft Text of EU Termination Treaty Reveals How Intra-EU BITs – and Sunset Clauses – are to be Terminated; Treaty also Creates EU Law-Focused Facilitation Process Designed to Settle Pending BIT Claims' (Investment Arbitration Reporter, 4 November 2019) <www.iareporter.com/articles/revealed-previously-unseen-draft-text-of-eu-termination-treaty-reveals-how-intra-eu-bits-and-sunset-clauses-are-to-be-terminated-treaty-also-creates-eu-law-focused-facilitation-p/> accessed 3 April 2021

[356] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1 (Termination Agreement).

[357] European Commission, 'EU Member States sign an agreement' (n 354).

[358] Tom Jones, 'UK and Finland face legal action over intra-EU BITs' (Global Arbitration Review, 14 May 2020) <https://globalarbitrationreview.com/achmea/uk-and-finland-face-legal-action-over-intra-eu-bits> accessed 4 April 2021

[359] These are Austria, Ireland, and Sweden.

national courts during setting aside, enforcement and other proceedings. Finally, I will summarize the key points of the Termination Agreement and analyse its possible implications.

1. Position of the Arbitral Tribunals

Prior to *Achmea*, the arbitral tribunals were rejecting the arguments of the Commission and Member States regarding their lack of jurisdiction primarily by maintaining that their jurisdiction to decide the case under the intra-EU BIT arises from the treaty, ie international law, not the EU law. Then they concluded that the Treaties did not supersede the intra-EU BITs when the second Member State acceded to the EU.[360]

Following *Achmea* the attitude of the arbitral tribunals towards the EU law arguments stayed quite hostile and there has not been any publicly known case where the tribunal did not uphold its jurisdiction.[361] Generally, there have been two ways the arbitral tribunals dealt with *Achmea* so far. Either they have rejected to deal with *Achmea* at all because of procedural impediments or they have found that its conclusions are not applicable to the case in question and it does not bind them.[362]

The arbitral tribunals mainly point out the lack of the international law analysis by the Court. In *Adamakopoulos v. Cyprus*,[363] the tribunal conceded that *Achmea* was a valid interpretation of the EU law as the Court had decided on the basis of the EU law. However, the tribunal was established by international law not EU law and as such had to resolve the issue of jurisdiction under international law for itself. As such, it continued to examine the issue as a conflict of treaties between the Treaties and the BITs.[364] In that matter it found that they do not share the same subject-matter and both the EU treaties and the BITs can 'operate side by side' as the BIT provides access to arbitration.[365] Similarly, the tribunal in *United Utilities v. Estonia*[366] concluded that the TFEU and the BIT do not cover the same subject-matter 'primarily because the TFEU does not provide any mechanism for adjudicating disputes between [the] Member States and private investors'.[367]

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[360] Szilárd Gáspár-Szilágyi and Maxim Usynin, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's *Achmea* Judgment' (2019) 4 European Investment Law and Arbitration Review Online 29, 35-36 <https://doi.org/10.1163/24689017_00401003> accessed 11 April 2021.
[361] ibid 34; David Sandberg and Jacob Rosell Svensson, 'Achmea and the Implications for Challenge Proceedings before National Courts' (2020) 5 European Investment Law and Arbitration Review Online 146, 148 <https://doi.org/10.1163/24689017_006> accessed 2 March 2021.
[362] Gáspár-Szilágyi and Usynin (n 360) 36, Guarín Duque (n 347) 805.
[363] *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Decision on Jurisdiction (7 February 2020)
[364] ibid para 162.
[365] ibid paras 168-172.
[366] United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No ARB/14/24, Award (21 June 2019)
[367] ibid para 543.

In this regard, the *Adamakopoulos v Cyprus* includes a dissenting opinion of arbitrator Kohen[368] accepting for the first time the jurisdictional objection regarding incompatibility of the BIT with EU law.[369] He firstly pointed out that the decision of the Court should not be disregarded just because it was based only on the EU law as it was 'an authoritative interpretation of [the] Treaties and of their impact on other rules of international law'.[370] He then countered the notion that only BITs include a dispute resolution mechanism by pointing to the role of domestic courts and the Court under the Treaties, ie the EU judicial system.[371] Finally, he argued that the BITs and the Treaties share the same substantive subject matter and that the BITs are incompatible with the EU law because of the exclusive jurisdiction of the Court and the principle of non-discrimination under the Article 18 TFEU.[372]

The tribunals also focus on the fact that following the Court's reasoning the dispute has to concern application of the EU law. Thus, they focus on the differences between arbitration agreements. In *Eskosol v Italy*,[373] the tribunal opened by stating that the Court 'was at pains throughout its analysis (…) to emphasize a concern' that the arbitration would resolve a dispute necessitating the application of EU law.[374] It then continued that in *Achmea* the Court found the applicability of the EU law through the particular wording of the arbitration clause which empowered the tribunal to decide both on the basis of the national law and all international agreements between the two Member States. It pointed out that the Court did not consider the EU law to be part of the general principles of international law even though they were also part of the applicable law. It then concluded that in the present case there is no such basis for the applicability of the EU law as the tribunal needs to decide the case only on the basis of the investment treaty and general principles of international law.[375]

The tribunal in *Eskosol v Italy* also examined the nature of the declarations of the Member States about the legal consequences of *Achmea*. It found that even if the declarations were of binding nature they could not have retroactive effect on an arbitration that had been initiated in

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[368] It should be noted that Kohen was appointed by Cyprus. *Adamakopoulos v Cyprus* (n 363) para 11.
[369] Bianca McDonnell, 'Theodoros Adamakopoulos and Others v. Republic of Cyprus, ICSID Case No ARB/15/49, Decision on Jurisdiction, 7 February 2020' (2020) 5 European Investment Law and Arbitration Review Online 315, 328 <https://doi.org/10.1163/24689017_013> accessed 6 April 2021.
[370] *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Statement of Dissent of Professor Marcelo G Kohen (3 February 2020), para 6.
[371] ibid paras 32-34.
[372] ibid paras 40-51.
[373] The proceedings were brought under the Energy Charter Treaty rather than an intra-EU BIT but this particular argumentation can be used in regards to BITs as well. *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Termination Request and Intra-EU Objection (7 May 2019).
[374] ibid para 171.
[375] ibid paras 172-174.

good faith.[376] To the contrary, Kohen in his dissenting opinion to *Adamakopoulos v Cyprus* argued that the declarations were an important authentic interpretation of the BITs in question and as interpretation were not retroactive. He also added that the question of the compatibility of intra-EU BITs and the EU law was unclear for decades and therefore the legal certainty of the investors could not have been infringed by such interpretation.[377]

More importantly, the tribunals considered the retroactivity of the *Achmea* judgment itself. In *Marfin v Cyprus,*[378] the tribunal stated that the source for its jurisdiction is not only the BIT but also the ICSID Convention.[379] Under the Article 25(1) ICSID Convention no party may unilaterally withdraw its once-given consent with the arbitration.[380] The tribunal then considered the Member State validly gave the consent prior to *Achmea* by way of the arbitration agreement in the BIT. As such, it could have only been withdrawn using the procedures under the BIT and not unilaterally or just by implication.[381]

Similarly, in *UP and CD v Hungary,*[382] the tribunal firstly noted that regardless of any effect *Achmea* might have on intra-EU BITs it does not mention the ICSID Convention and the effect of EU law on the consent to arbitration under the Article 25 ICSID Convention. As such, the *Achmea* judgment cannot lead to a valid retroactive withdrawal of consent. The tribunal also made an interesting point that even if the BIT had been terminated when the second Member State acceded to the EU, ie when the BIT had become an intra-EU BIT, the investors would be protected by the sunset clause. In the absence of any action by the Member States to modify and terminate this clause the tribunal would still have jurisdiction to decide the case.[383]

In *RREEF v Spain*[384] the tribunal went even further when it pointed out that investment arbitration is based on consent of the parties and '[n]o *post-hoc* decision of the [Court]' can affect such given consent. It also pointed out that if the consent to arbitration breaches the EU law it is the internal matter of the EU and does not impact the application of international law.[385] It is noteworthy that the tribunal made its conclusion without any recourse to the ICSID

[376] ibid para 226.
[377] *Adamakopoulos v Cyprus*, Statement of Dissent (n 370) paras 52-60.
[378] *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award (26 July 2018)
[379] ibid para 592.
[380] ICSID Convention, art 25(1).
[381] *Marfin v Cyprus* (n 378) paras 593-594.
[382] *UP (formerly Le Chèque Déjeuner) and CD Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award (9 October 2018)
[383] ibid paras 259-266.
[384] The proceedings were once again brought under the Energy Charter Treaty rather than an intra-EU BIT but the particular argumentation can be used in regards to BITs as well. *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux S à rl v Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018).
[385] ibid para 213.

Convention suggesting that it considered the prohibition of a subsequent withdrawal of consent with arbitration to be a general principle of investment law.[386]

Finally, quite a niche but interesting argument was presented by the tribunal in *Greentech v Italy*[387] where the tribunal mentioned the language differences between the English and the French versions of the *Achmea* judgment. It compared the verbs 'to preclude' and '*s'opposer*' which the Court used to describe the incompatibility of the arbitration clause in the BIT with the EU and concluded that the French language text allowed for a greater flexibility rather than unequivocal prohibition.[388]

In conclusion, the arbitral tribunals have so far been very sceptical to the *Achmea* judgement pointing to the lack of international law considerations by the Court and its reliance on the specific wording of the arbitration agreement in the Netherlands-Slovakia BIT. They also frequently compare the subject-matter of the BITs and the Treaties which the Court, unlike the Advocate General Wathelet in his Opinion,[389] has not done. Finally, the tribunals take issue with the possible retroactive effect of the *Achmea* judgement and the unilateral withdrawal of the consent to arbitrate. In this regard it will be interesting to see whether the tribunals would try to apply this argument also to proceedings initiated after *Achmea* was decided.

[386] Gáspár-Szilágyi and Usynin (n 360) 41.
[387] *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No V 2015/095, Final Award (23 December 2018)
[388] ibid paras 393-94.
[389] *Achmea*, Opinion of AG (n 82) paras 179-228.

2. Position of Courts

The national courts are involved mainly when deciding during the setting aside proceedings in non-ICSID cases and then during enforcement of the award. They can also sometimes decide in special proceedings allowed by the *lex arbitri.* In Germany for example a party can request a court to decide on the admissibility of the arbitration proceedings prior to the establishment of the arbitral tribunal.[390]

In case of the incompatibility of intra-EU BITs with EU two general grounds for setting aside, non-enforcement, or inadmissibility seem most relevant. Those would be the invalidity of the arbitration agreement and the public policy exception.[391] Breach of the EU law may cause a conflict with the public policy under the *Eco Swiss* doctrine[392] but its use in practice is problematic as it is very much unclear which parts of the EU law compose the public policy.[393] Unlike the invalidity of the arbitration agreement it is also only relevant for the courts seated in the EU.

Moreover, the *Achmea* judgment puts the courts seated in the EU into an awkward position. On one hand, they have to uphold the Court's ruling which bindingly decided that the intra-EU BITs were and are incompatible with the EU law. On the other hand, they have to comply with the obligations arising from the ICSID Convention and the New York Convention.[394] As such, they may be more inclined to find ways to follow *Achmea* while staying within limits of their obligations under the international law than non-EU courts which may be more easily disregard the judgment. I will therefore divide this section between the analysis of the decisions of the EU courts and the non-EU courts.

2.1. The EU Courts

The case-law of the EU courts is so far not as extensive as that of the arbitral tribunals but there have already been some high-profile decision. Starting with the continuation of the *Achmea* saga, the German Federal Court of Justice which made the preliminary ruling referral decided the

[390] § 1032(2) German Civil Procedure Act.
[391] Scheu and Nikolov (n 345) 260.
[392] See discussion in Section I.3.2 (*Preliminary Ruling Requested by a Reviewing National Court*).
[393] Scheu and Nikolov (n 345) 263.
[394] Gáspár-Szilágyi and Usynin (n 360) 53.

underlying case in October 2018.[395] Although, it quite unsurprisingly set aside the award, the reasoning still deserves attention.

(i) Decisions of the German courts in Achmea

Interestingly, the Federal Court of Justice did so based only on the lack of a valid arbitration agreement and did not address the issue of a breach of public policy.[396] It also noted that the Court's preliminary ruling concerned the incompatibility of the Netherlands-Slovakia BIT itself with the EU law, not the incompatibility of the arbitration agreement. However, it found that in the present case the BIT and the arbitration agreement are indivisible since the offer to arbitrate was included the BIT. As a result of the *Achmea* judgment the offer had no effect and no arbitration agreement could have been concluded.[397] The decisive factor was therefore the lack of a valid offer to arbitrate. This suggests that should a German court find another source of the arbitration agreement in a specific case, it may not be in its view automatically incompatible with the EU law.[398]

However, the Federal Court of Justice denied the argument that the arbitration agreement was made by way of participation in the arbitration proceedings.[399] Moreover, it confirmed that it was immaterial whether the tribunal applied the EU law in the actual case.[400] Finally, it stated that the *Achmea* judgment has a direct effect on intra-EU BITs and their termination under international law is not necessary for the setting aside of award.[401] The decision is now challenged in front of the German Federal Constitutional Court (*Bundesverfassungsgericht*). So far, the court only denied two injunction motions to stop the German government from signing the Termination Agreement.[402] Nevertheless, the final decision may still throw another curveball to intra-EU BIT issues.[403]

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[395] *Achmea* BGH Judgment (n 26).
[396] Sandberg and Svensson (n 361) 154.
[397] *Achmea* BGH Judgment (n 26) para 28.
[398] Sandberg and Svensson (n 361) 155.
[399] *Achmea* BGH Judgment (n 26) para 27.
[400] ibid para 32.
[401] ibid paras 40-41.
[402] BVerfG (23 March 2020) 2 BvQ 6/20; BVerfG (3 February 2021) 2 BvQ 97/20.
[403] See for example Nikos Lavranos, 'The CJEU – German Constitutional Court Debate and Impact on Achmea and the Termination Agreement' (Kluwer Arbitration Blog, 21 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/21/the-cjeu-german-constitutional-court-debate-and-impact-on-achmea-and-the-termination-agreement/> accessed 29 March 2021.

(ii) Decisions of the Swedish courts in PL Holdings v Poland

Even more interesting is perhaps the decision of the Swedish Svea Court of Appeal (*Svea hovrätt*)[404] which ruled on the setting aside of the *PL Holdings v Poland*[405] award. There the court considered the breach of public policy. According to the Svea Court of Appeal following the *Eco Swiss* and *Mostaza Claro* rulings the award would be against public policy if its substantive content infringed on fundamental EU law. This was not the case. Similarly, the court denied the argument that the award was based on an arbitration agreement concluded contrary to public policy. It found that in *Mostaza Claro* the public policy exception was necessary to protect the weaker party whereas there was no such imbalance between the investor and the State. Therefore, the Svea Court of Appeal ultimately found that the award did not infringe upon Swedish public policy.[406]

In relation to the lack of valid arbitration agreement the court applied the *Achmea* judgment since it found that the arbitral tribunal could have been liable to interpret or apply EU law and that it was not considered a court or tribunal within the meaning of the Article 267 TFEU.[407] However, it stressed out that even though the standing offer in the BITa was invalid, *Achmea* did not preclude a Member State and the investor from concluding an arbitration agreement on the basis of party autonomy. As such, the Member State was not bound by its offer in the BIT but it could still enter into an arbitration agreement with the investor when it initiated the arbitration proceedings.[408]

The Svea Court of Appeal than continued that pursuant to the Swedish *lex arbitri* when a valid arbitration agreement can be theoretically concluded the parties have to raise their objections regarding the validity in their statement of defence at latest. In the court's view Poland had not done so and therefore it was precluded from claiming the invalidity of the arbitration agreement during the setting aside proceedings.[409] The court therefore did not per se state that the investor and Poland concluded a tacit arbitration agreement through their participation in the arbitration proceeding as some commentators suggest.[410] Rather the court limited itself to asserting that there is the possibility that Poland and the investor could have had

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[404] *Poland v PL Holdings*, T 8538–17 Svea Court of Appeal (unofficial English translation) <https://www.italaw.com/sites/default/files/case-documents/italaw10447.pdf> accessed 7 April 2021.
[405] *PL Holdings S à rl v Republic of Poland*, SCC Case No V 2014/163, Partial Award (28 June 2017).
[406] *Poland v PL Holdings*, Svea Court of Appeal (n 404), para 5.2.6.
[407] ibid para 5.2.4.
[408] ibid para 5.2.3.
[409] ibid para 5.2.7.
[410] Compare Scheu and Nikolov (n 345) 262.

entered into a valid arbitration agreement and in such a case Poland was required according to the *lex arbitri* to raise its intra-EU jurisdictional objection during the early stage of the arbitration proceedings.

As such, the Svea Court of Appeal did not set aside the award and the case went in front of the Swedish Supreme Court (*Högsta domstolen*) which made a referral to the Court in this regard. It raised the question whether the interpretation of the Articles 267 and 344 TFEU set forth in *Achmea* precludes the conclusion of a valid arbitration agreement between an investor and a Member State which by its 'free will' refrains from raising jurisdictional objections.[411] It concerns the Member State's capacity as a private party to conclude an arbitration agreement regarding the investments directly with the investor.[412] It therefore aims at the distinction the Court made in *Achmea* between commercial and investment arbitration. As discussed above,[413] the Court did not choose the subject matter of investment arbitration as the differentiating criterion but rather consent. Whereas, in this case the condition of consent or 'free expressed wishes of the parties' as stated by the Court could be fulfilled and thus still subject the protection of foreign investment to arbitration.

At the end of April 2021, the Advocate General Kokott issued her Opinion regarding the referral.[414] The she firstly took the stance that individual arbitration agreements may have had the same detrimental effect on the autonomy of EU law as those based on intra-EU BITs and in cases such as *PL Holdings* they would basically lead to a circumvention of the *Achmea* judgment.[415] The risk of infringement of EU law by the arbitral tribunal would be still present.[416] She also added that this situation has to be distinguished against commercial arbitration because 'the case in the main proceedings is not a commercial dispute between parties on an equal footing, but relates to the exercise of sovereign powers'.[417] Furthermore, private parties are not subject to the obligation under Article 344 TFEU. Thus, arbitration proceedings between them may be allowed regardless of the risk of infringement of EU law.[418] She concludes that the individual arbitration agreement 'concerning the sovereign application of EU law' are

[411] Case C-109/20 *PL Holdings* (pending), Request for a preliminary ruling.
[412] Sandberg and Svensson (n 361) 164.
[413] See Section I.3.2 (*Preliminary Ruling Requested by a Reviewing National Court*).
[414] Case C-109/20 *PL Holdings* (pending), Opinion of AG Kokott ECLI:EU:C:2021:321.
[415] ibid paras 31-34.
[416] paras 59-64.
[417] ibid para 54.
[418] ibid para 58.

compatible with EU law 'only if courts of the Member States can comprehensively review the arbitration award for its compatibility with EU law'.[419]

The Advocate General Kokott therefore expanded on the differences between commercial and investment arbitration. She focused more on the subject matter rather than purely consent as the Court had done. In my view, this is a better way of making the distinction. However, she still mentioned that arbitration between individuals is possible because, unlike the Member States, the Article 344 TFEU does not bind them. This would suggest that all arbitration agreements concluded by the Member States would be incompatible with the EU law regardless of the subject matter of the dispute. Such a stance is very unfortunate as it would invalidate the arbitration clauses in all governmental contracts even though the Member State concluded them willingly during contract negotiations. In this regard, the Advocate General did not distinguish between arbitration agreements concluded prior to the emergence of the dispute and those concluded *ex post*. This would hinder the Member States to effectively procure services. Furthermore, it would pose the question of which entity is still equivalent to the Member State pursuant to the Article 344 TFEU and which is for example already a private company with only a share owned by the Member State.

Interestingly, she made a caveat in her proposed ruling when she stated that the arbitration agreement would incompatible only insofar as the courts could not 'comprehensively review the arbitration award'. The Court could have proposed a similar exception in *Achmea* but it did not. It considered all arbitration clauses in intra-EU BITs to be incompatible with EU law regardless of the subsequent scope of the court review. The Advocate General Kokott therefore suggests that a new layer of case-by-case analysis should be employed. All in all, I would argue that the Opinion goes into the right direction with focusing more on the case-specific questions like the subject matter of the dispute or the extent of the actual use of EU law and the review by the national courts. However, it fails to protect against unwanted spillover to the capacity of the Member States to freely negotiate complex contracts during public procurement.

(iii) Decision of the German court in Raiffeisen Bank v Croatia

The most recent court decision[420] was issued in February 2021 by the Higher Regional Court in Frankfurt am Main in regards to *Raiffeisen Bank v Croatia*.[421] The case is particularly

[419] ibid para 65.
[420] OLG Frankfurt (11 February 2021) 26 SchH 2/20.

important because the Austria-Croatia BIT[422] included very different arbitration clause than the one analysed in *Achmea*. The applicable law under the BIT was only the BIT itself and general principles of international law.[423] The investors therefore argued that *Achmea* was based on the concrete analysis of that case where the tribunal could have interpreted or applied EU law. In the present case on the other hand the tribunal may use EU law only as a matter of fact.[424] The Higher Regional Court did not follow this reasoning as it began by proclaiming that the *Achmea* judgment was, despite its case-specific remarks, a landmark decision with effect on all intra-EU BITs. It then continued by stating that it is immaterial that the tribunal would use EU law only as a matter of fact. The crucial distinction between CETA and the BIT is that CETA provides for sufficient guarantees for the protection of the autonomy of EU law.[425]

Similarly to the Court, the Higher Regional Court argued that the tribunal might be always called to interpret or apply EU law as part of the national law. It is then this possibility that is sufficient for the breach of autonomy of EU law, not a manifested interpretation in a given case. This is also supported by the fact that the judgment was not connected to any particular award, in which the tribunal could have actually interpreted or applied EU law, as Croatia applied to the court to generally decide on the admissibility of the arbitration prior to the establishment of the tribunal.[426] In this the decision notably shows the diametrically opposing views of the arbitral tribunals and the national courts. Whereas the tribunal in *Eskosol v Italy* thoroughly analysed the arbitration agreement and the exact wording of the *Achmea* judgment to find that it would not interpret or apply EU law.[427] The Higher Regional Court adopted the broad view of the Court that the tribunal might always use EU law as part of national law and that already runs contrary to the autonomy of EU law.

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[421] *Raiffeisen Bank International AG and Raiffeisenbank Austria dd v Republic of Croatia*, ICSID Case No ARB/17/34, Decision on the Respondent's Jurisdictional Objections (30 September 2020).
[422] Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments (adopted 19 February 1997, entered into force 1 November 199) 2098 UNTS 517 (Austria-Croatia BIT).
[423] Austria-Croatia BIT, art 10(6).
[424] OLG Frankfurt (11 February 2021) 26 SchH 2/20, 5-6.
[425] ibid 8-10.
[426] ibid. In fact, the tribunal managed to render an award on jurisdiction before the court decided but the court still did not consider it in its judgment.
[427] See section II.1 (*Position of the Arbitral Tribunals*).

(iv) Conclusion

In conclusion, the EU national courts so far considered *Achmea* to apply to all BITs regardless of the particular wording of the arbitration agreement. Thus they decided that the standing offer in the BIT had not been valid and could not have led to the conclusion of an arbitration agreement. However, it is unclear whether the investor and Member State can conclude a separate arbitration agreement during the arbitration proceedings based on their party autonomy. The Swedish Svea Court of Appeal believes so and the German courts seem to at least suggest it as a possibility. The question will therefore have to be cleared up by the Court in its preliminary ruling requested by the Swedish Supreme Court. However, the Opinion of the Advocate General Kokott does not show much hope in this regard.

2.2. The Courts outside of the EU

The practice of courts outside of the EU is currently quite limited and concerns almost exclusively only the *Micula*[428] award. Therefore, it has to be noted that the facts of that case are quite specific because the dispute emerged and the arbitration proceedings were commenced before the Romania's accession to the EU. I have already touched upon the enforcement of the *Micula* award in the UK[429] but the reasoning of the United Kingdom Supreme Court is worth examining again.

The Supreme Court focused on the Article 351 TFEU which states that the obligations arising from international agreements between a Member State and third countries concluded before the accession of such Member State to the EU are not affected by the Treaties.[430] The Supreme Court found that the obligation of enforcement of awards under the Article 54 ICSID Convention was owed to all other Contracting Parties, ie also to non-Member States. As such, it was an obligation that fell under the Article 351 TFEU.[431] Therefore, it could have not been affected by any obligations under the Treaties and mainly the duty of sincere cooperation had to be disregarded. On this basis, the Supreme Court ruled that the award had to be enforced and lifted the stay on the enforcement proceedings.[432]

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[428] *Micula*, Final Award (n 241).
[429] See section I.3.2 (*Preliminary Ruling Requested by a Reviewing National Court*).
[430] TFEU, art 351.
[431] *Micula* UKSC (n 244) [104]-[108].
[432] ibid [84]-[87], [118].

The overt reliance on the Article 351 TFEU is important because the United Kingdom acceded to the ICSID Convention in 1967[433] and to the EU in 1973.[434] However, that is not the case for the New York Convention which was ratified only in 1975.[435] The same line of thought would not be therefore analogically applicable to the enforcement of non-ICSID awards. Moreover, considering the terms of the Withdrawal Agreement[436] the United Kingdom courts should be still bound by the *Achmea* judgment even after leaving the EU.[437] The United Kingdom courts may therefore have to make a distinction between ICSID and non-ICSID awards in the future and deny enforcement of the latter.

The *Micula* award made its way also in front of the United States courts. The investor sought confirmation of the award by the District Court for the District of Columbia so that it could be enforced in the United States. Romania countered that there was no valid arbitration agreement and therefore it should not fall under sovereign immunity exceptions under the United States law.[438] Thus, the District Court had to decide whether *Achmea* was applicable. It began from the perspective that the Court in *Achmea* was interested in protecting the autonomy of the EU law.[439] Unsurprisingly, it found that there was a clear difference in the facts of the cases since in *Achmea* Slovakia was a Member State of the EU at time of inception of the dispute. On the other hand, in *Micula* all the decisive facts happened before the accession of Romania to the EU. However, more interestingly the District Court analysed the final award whether the tribunal actually had interpreted or applied the EU law and had found that it had not. It therefore conducted a case-by-case analysis, propagated also by the arbitral tribunals themselves, rather than applying the standard of the mere liability to interpretation or application of the EU law.[440]

In conclusion, even though the *Micula* award is based on different facts, the reasoning of the courts provides a valuable insight to how the courts may treat future intra-EU awards. Especially interesting is the view of the District Court for the District of Columbia which checked whether the EU law had been actually interpreted or applied in the arbitration proceedings. So far, the non-EU courts thus seem to take a route more similar to that of the arbitral tribunals than of the

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[433] 'Database of ICSID Member States' (International Centre for Settlement of Investment Disputes) <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 1 May 2021.
[434] 'The 27 Member Countries of the EU' (European Union) <https://europa.eu/european-union/about-eu/countries_en#tab-0-1> accessed 1 May 2021.
[435] 'Contracting States' (New York Arbitration Convention) <www.newyorkconvention.org/countries> accessed 1 May 2021.
[436] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384I/1.
[437] ibid art 89.
[438] *Micula and others v Government of Romania*, Case 1:17-cv-02332-APM (DDC), 15-16.
[439] ibid 19.
[440] ibid 20-21. The judgment of the District Court was also later confirmed by the Court of Appeal.

EU courts and perform a case-by-case analysis rather than a automatically apply *Achmea* to all intra-EU arbitration proceedings.

3. The Termination Agreement

After the *Achmea* judgment, the Commission finally received a broad support of the Member States in its fight against the intra-EU BIT. Following the political declarations discussed above, all of the Member States settled on the final text of the Termination Agreement in October 2019. However, only twenty-three Member States signed the Termination Agreement in May 2020.[441] The United Kingdom was at that time in middle of its transition period during the withdrawal from the EU and wanted to quite understandably keep its BITs with the Member States intact. Ireland most likely did not participate because it terminated its only intra-EU BIT already in 2011. However, the BIT still had a sunset clause which is still in effect.[442] As for Austria, Finland, and Sweden it is unclear why they withheld their support to the Termination Agreement even though they were included in the draft at the end of 2019.[443]

The Termination Agreement entered into force after the ratification by the second Contracting Party on 29 August 2020. However, as of writing of this thesis only twelve of the twenty-three Contracting Parties have ratified the treaty.[444] Since the Termination Agreement requires that both of the Contracting Parties to a certain BIT have to ratify the Termination Agreement for the BIT to be terminated,[445] it actually means that most of the roughly 130 included intra-EU BITs still remain unaffected.

(i) The Content of the Termination Agreement

The substantive content of the Termination Agreement can be divided into two main parts. Firstly, it provides for the termination of all the listed intra-EU BITs and '[f]or greater certainty' states that the sunset clauses in those intra-EU BITs should not have any legal effect.[446] It then

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[441] European Commission, 'EU Member States sign an agreement' (n 354).
[442] Guarín Duque (n 347) 819.
[443] All three of these Member States are notably the capital exporters and their nationals receive the most protection from the BITs. Therefore, it could be speculated that the governments were lobbied by their nationals with investment awards or arbitration proceedings against other Member States. In case of Austria it could have been connected to the claims of Austrian banks against Croatia, see for example Cosmo Sanderson, 'German Court Blocks Intra-EU Claim against Croatia' (Global Arbitration Review, 16 February 2021) <https://globalarbitrationreview.com/german-court-blocks-intra-eu-claim-against-croatia> accessed 7 April 2021.
[444] See the progress at 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' (General Secretariat of the Council) <www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049> accessed 1 May 2021.
[445] This flows from the wording, among others, of the Article 12(2) Termination Agreement which considers the date on which the Termination Agreement entered into force for both Contracting Parties as the date relevant for the termination of the BIT in question.
[446] Termination Agreement, art 2.

continues with the termination of sunset clauses in intra-EU BITs that were already terminated prior to the Termination Agreement.[447]

Secondly, it deals with the effects on the arbitration proceedings that are or were lead under the BITs. It divides between concluded, pending, and new arbitration proceedings. The concluded arbitration proceedings are in short those that ended and the award was executed before the *Achmea* judgment and there were no running annulment, revision, or other proceedings.[448] These are unaffected by the Termination Agreement and shall not be reopened.[449] The new arbitration proceedings are those that were initiated after the *Achmea* judgment.[450] They are simply disallowed as the arbitration agreements in the BITs 'shall not serve as legal basis' for their commencement.[451]

The pending arbitration proceedings are those that were initiated prior to *Achmea* but have not yet been concluded.[452] These are the most complicated as the Termination Agreement provides two different paths. Firstly, it introduces in the Article 9 a facilitative procedure which the investor and the Member State should undertake to resolve the dispute amicably. In short, the investor and the Member State choose a facilitator which proposes a final settlement agreement based on the submissions of both parties.[453] Secondly, it guarantees in the Article 10 that the investor may bring its claim before a domestic court even if the domestic time limits have already expired. However, both of these options require that the investors firstly withdraw their claim in front of the arbitral tribunal which may significantly reduce their attractiveness and in turn the real impact of the Termination Agreement.

(ii) The Retroactivity of the Termination Agreement

The Termination Agreement thus affects the arbitration clauses in the intra-EU BITs, running arbitration proceedings, and even on already rendered awards. The agreement puts the date of the *Achmea* judgment, ie 6 March 2018, as the main delimiting factor and basically states that on this date the arbitration clauses in the intra-EU BITs lost their effect. On the other hand, the first intra-EU BIT was terminated by the agreement only on 29 August 2020.[454] This leads to a

[447] ibid art 3.
[448] ibid art 1(4).
[449] ibid art 6.
[450] ibid art 1(6).
[451] ibid art 5.
[452] ibid art 1(5).
[453] For a more detailed analysis of the procedure see for example Guarín Duque (n 347) 812-816.
[454] This was the BIT between Denmark and Hungary.

retroactive effect of more than two years, or even more in case of BITs between Member States which are slow at ratifying the agreement, before the termination of the respective BIT. Moreover, at first glance it may seem that only the new arbitration proceedings are affected. However, the only proceedings which are untouched by the Termination Agreement are those that are concluded, which entails also the full execution of the final award. All other arbitration proceedings, even those where the final award was rendered but not enforced before *Achmea*, are designated as 'new' or 'pending' and therefore illegitimate.

The VCLT allows in principle that treaties may have retroactive effect when the Contracting Parties so agree.[455] Nevertheless, in this case the rights of individual investors are at stake. As such, the Termination Agreement seriously questions the principles of legal certainty and protection of legitimate expectations which are recognized also by the Court itself.[456] Even more importantly, the agreement may breach the fundamental rights of the investors to, among others, property and fair trial as protected by the Charter and ECHR.[457]

Moreover, considering the analysis of the political declarations by the arbitral tribunal in *Eskosol v Italy*, it does not seem that the tribunals would be inclined to give retroactive effect to the Termination Agreement. In case of the still running arbitration proceedings they may consider it a withdrawal of consent. However, as discussed the Article 25(1) ICSID Convention forbids unilateral withdrawal consent during proceedings administered by ICSID and the tribunal in *RREEF v Spain* suggested that it is even a general principle of investment law which might therefore apply to non-ICSID arbitration proceedings as well.

(iii) Conclusion

As such, the Termination Agreement was supposed finally resolve the issue of the intra-EU BITs. However, its slow ratification means that most of the BITs have not been terminated yet. Moreover, its retroactive effect on running arbitration proceedings or even final but not yet enforced awards may cause it to not only be still disregarded by the arbitral tribunals but also cause more disputes before national courts, the Court, and the European Court of Human Rights. The requirement that the investor withdraws its claim in front of the arbitral tribunal before it can

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[455] VCLT, arts 28, 70.
[456] Guarín Duque (n 347) 817.
[457] See for example Gordon Nardell QC and Laura Rees-Evans, 'The agreement terminating intra-EU BITs: are its provisions on 'New' and 'Pending' Arbitration Proceedings compatible with investors' fundamental rights?' (2020) Arb Intl <https://doi.org/10.1093/arbint/aiaa046> accessed 10 April 2021.

engage in the facilitative procedure significantly hampers the practical application of the Termination Agreement even in this regard. Altogether, I would argue that the Termination Agreement not only does not resolve the problematic application of *Achmea* but introduces issues of its own.

4. Summary

Following the *Achmea* judgment there was a significant political shift towards the termination of the intra-EU BITs. The Member States firstly proclaimed that the decision affects all intra-EU BITs and then in mid-2020 twenty-three of them continued to sign the Termination Agreement. However, the reception of the decision by the arbitral tribunals and the national courts is a different story.

The arbitral tribunals stuck to their scepticism towards the EU law arguments and focused on the deficiencies and of the *Achmea* judgment. They mainly pointed to the lack of an international law analysis of the question and the reliance on the specific wording of the arbitration clause in the Netherlands-Slovakia BIT. Moreover, the tribunals denied the retroactive effect of *Achmea* on the, in their view, validly concluded arbitration agreement and invoked the prohibition of unilateral withdrawal of the consent with arbitration included in the ICSID Convention. One tribunal even suggested that this prohibition is a general principle of investment law. Altogether, there has been only one dissenting opinion of an arbitrator who accepted the *Achmea* so far and there has not been a single publicly documented case where the tribunal denied its jurisdiction because of it.

The national courts on the other hand seem to take a less confrontational route. The EU courts especially have generally accepted the applicability of the *Achmea* judgment to all intra-EU BITs. Therefore, no valid arbitration agreements could had been concluded based on the arbitration clauses included in them. Nevertheless, the courts seem to be open to the possibility that the investor and the Member State could enter into a separate arbitration agreement during the arbitration proceedings. The Swedish Supreme Court requested a preliminary ruling from the Court in this regard. However, the Advocate General Kokott seems to take a rather negative stance towards the individual arbitration agreements in her Opinion as she argues that a comprehensive review by the national courts is necessary so that the autonomy of the EU law is not threatened. The non-EU courts seem to look at the issue more pragmatically and do not agree with the automatic application of *Achmea* to all intra-EU disputes. Therefore, they resort to a case-by-case analysis more similar to that used by the arbitral tribunals.

Lastly, the Termination Agreement does not seem to bring the solution to the concerns of the arbitral tribunal and the national courts either as it includes wide retroactive effect. It sets the date of the *Achmea* judgment as the dividing line between valid and invalid arbitration proceedings. Thus any proceedings initiated or still running after the judgment, and even arbitral awards rendered prior to the *Achmea* but not yet fully executed, are pursuant to the agreement

illegitimate. As such, they should be discontinued by the parties and these should engage in the amicable dispute resolution procedure provided for by the Termination Agreement.

In conclusion, the arbitral tribunals have not changed their antagonistic position towards the incompatibility of the arbitration clauses in intra-EU BITs with the EU law and its repercussions on their jurisdiction. The Member States may still find support in front of the national courts. However, this brings unnecessary legal uncertainty for both the investors and the Member States. The Termination Agreement tries to bring the solution but considering its issues of retroactive effect it may, in my view, bring even more disputes in front of the national courts, the Court, and even the European Court of Human Rights.

Conclusion

The Court in *Achmea* dealt with a complex legal issue concerning both EU and international law which would greatly influence the landscape of cross-border investment within the EU internal market. However, it did not do it justice with its reasoning.

I have shown that the Court did not reflect its case-law regarding the Article 344 TFEU and disputes including individuals and extended its application to the investor-State arbitration without much explanation. The Court then relied extensively on the wording of the specific arbitration clause in the Netherlands-Slovakia BIT to establish that the arbitration tribunal would be liable to apply or interpret EU law. The conclusions of the Court therefore cannot be easily extended to other intra-EU BITs. In the Opinion regarding CETA the Court further undermined the general application of *Achmea* when it found that with sufficient safeguards the arbitration tribunal would not apply or interpret EU law within the meaning of the Article 344 TFEU.

With regards to the preliminary ruling procedure under the Article 267 TFEU I came to the conclusion that the arbitral tribunals established under intra-EU BITs generally fulfil most of the criteria to be considered the courts or tribunals of a Member State. The only exception is the inclusion in the judicial system of a Member State which could in my view still be achieved on a case-by-case basis. However, practically more important is that the Court failed to properly distinguish between commercial and investment arbitration and explain why the *Eco Swiss* doctrine treatment could not be extended to investment arbitration as well. I believe that it is important to differentiate between ICSID and non-ICSID proceedings as in the latter case, the post-arbitration review of the award by the national courts is virtually the same as in the case of commercial arbitration. As such, at least the arbitration clauses providing for non-ICSID arbitration proceedings should not be considered to be in breach of the Article 267 TFEU.

The principle of mutual trust was then just an underlying theme of the judgment rather than a principle that could have been breached by the intra-EU investment arbitration. Altogether, the Court in *Achmea* deviated from its previous case-law. However, when it tried to distinguish the arbitration tribunals established under intra-EU BITs against the facts of the previous cases it mostly did not provide persuasive arguments as to why the tribunals are so different. This adds to the fact that the Court based these arguments on the specific provisions of the Netherlands-Slovakia BIT and majorly hinders the applicability of the judgment to other intra-EU arbitration cases.

So far, the practice of the arbitral tribunals has not changed and they still uphold their jurisdiction. The national courts then generally accept the judgment and do not argue with it. Nevertheless, they consider the possibility that the investors and the Member States may conclude an arbitration agreement after the dispute has already arisen. The Advocate General Kokott was opposed to it in her Opinion relating the pending preliminary ruling request regarding this issue. However, her reasoning would in its entirety lead to the incompatibility of all arbitration clauses, even those in regular contracts, concluded by the Member States. The final decision of the Court might therefore take a different route.

Finally, the Termination Agreement signed by most of the Member States does not seem to finally resolve the issue of intra-EU BITs either. The arbitration clauses are deemed invalidated on the date of the *Achmea* judgment which leads to a minimum of a two year retroactive effect. That is an important interference into the individual rights of the investors who have already initiated arbitration proceedings or even received a final award. The agreement itself may therefore lead to new disputes in front the national courts, the Court, and the European Court of Human Rights. The ratification process is also rather slow and majority of the intra-EU BITs have not been terminated yet.

All in all, the *Achmea* judgment was supposed to give the final answer to the question of the compatibility of arbitration clauses in intra-EU BITs with the EU law. However, it seems that it merely opened the next chapter full of new legal challenges and conflicts.

List of Abbreviations

1968 Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
AFSJ	Area of Freedom, Security, and Justice
Austria-Croatia BIT	Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments
BIT	Bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
Charter	Charter of Fundamental Rights of the European Union
Court	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Netherlands-Slovakia BIT	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Termination Agreement	Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union
TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006
VCLT	Vienna Convention on the Law of Treaties
Withdrawal Agreement	Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

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Rozhodčí doložky ve dvoustranných dohodách o podpoře a ochraně investic a jejich (ne)soulad s právem EU

Abstrakt

Cílem této diplomové práce je kriticky zanalyzovat rozsudek ve věci *Achmea* a jeho dopady na soulad rozhodčích doložek ve dvoustranných dohodách o investicích mezi členskými státy EU s právem EU. V první části se proto práce zaměřuje na samotný rozsudek a identifikuje hlavní právní důvody, o které se Soudní dvůr EU opíral, a které následně konfrontuje s relevantní judikaturou a doktrinálními stanovisky. Nejprve je představena zásada autonomie práva EU a je diskutována aplikovatelnost článku 344 SFEU na investiční arbitráž. Poté je rozebráno, zda rozhodčí soud zřízený na základě dvoustranných dohod o investicích mezi členskými státy EU může být soudem ve smyslu článku 267 SFEU a zda následný přezkum rozhodčího nálezu vnitrostátním soudem může být dostatečný k zajištění jeho souladu s právem EU. Práce se zaměřuje zejména na rozlišení mezi rozhodčími soudy v rámci obchodní a investiční arbitráže provedené Soudním dvorem EU. První část je zakončena analýzou principu vzájemné důvěry a jeho role v rozsudku *Achmea*.

Druhá část práce se pak zabývá vývojem po vydání rozsudku. Po stručném úvodu do politického posunu proti zmíněným dvoustranným dohodám o investicích, ke kterému došlo v rámci členských států, jsou analyzovány nejdůležitější vydané rozhodčí nálezy a soudní rozhodnutí. Hlavní pozornost je věnována tomu, jak rozhodčí soudy a vnitrostátní soudy přistupovaly k rozsudku a zda považovaly rozhodčí doložky v daných případech za neplatné. Diskuze se věnuje také tomu, zda v argumentaci Soudního dvora EU identifikovaly limity a nedostatky, které by mohly naznačit výsledek jejich budoucího rozhodování. Druhou část a práci pak uzavírá kapitola věnovaná dohodě o ukončení platnosti dvoustranných dohod o investicích mezi členskými státy EU s cílem zjistit, zda by tato dohoda mohla konečně přinést závěr této ságy.

Klíčová slova: Achmea, dvoustranné dohody o investicích, rozhodčí doložky, autonomie práva EU

Arbitration Clauses in Bilateral Investment Treaties and their (in)compatibility with EU law

Abstract

The objective of this Master's Thesis is to critically analyse the *Achmea* judgment and its repercussions for the compatibility of arbitration clauses in the intra-EU BITs with the EU law. In the first part, the thesis therefore focuses on the judgment itself and identifies the main legal grounds the Court relied upon and contrasts them with the relevant case-law and doctrinal opinions. Firstly, the principle of the autonomy of the EU law is introduced and the applicability of the Article 344 TFEU on the investment arbitration is discussed. Then, it is considered whether an arbitral tribunal established under an intra-EU BIT may be a tribunal within the meaning of the Article 267 TFEU and whether subsequent review of the award by national court may be sufficient to guarantee its compliance with the EU law. Particularly, the thesis focuses on the Court's distinction between the commercial and investment arbitral tribunals. The first part ends with an analysis of the principle of the mutual trust and its role in the *Achmea* judgment.

The second part of the thesis then deals with the development after the judgment. Following a brief introduction into the political shift against the intra-EU BITs which occurred among the Member States, the most relevant arbitral awards rendered and court decisions issued are analysed. The main focus is on the way the arbitral tribunals and national courts treated the judgment and if they considered the arbitration clauses in the cases to be invalid. The fact whether they identified any limitations in the argumentation of the Court which might suggest the result of their future rulings is also discussed. The second part and the thesis finish with a chapter on the plurilateral agreement on termination of the intra-EU BITs to see whether the agreement could finally provide the conclusion to the intra-EU BIT saga.

Key Words: Achmea, bilateral investment treaties, arbitration clauses, autonomy of EU law